

*Martial law is thought to be not a complete absence of law, nor a special kind of law – a scheme of legal regulation – but, rather, an absence of law prescribed by law under the concept of necessity – a legal black hole, but one created, perhaps even in some sense bounded, by law. A.V. Dicey claimed that martial law in this sense is ‘unknown to the law of England,’ which is ‘unmistakable proof of the permanent supremacy of the law under our constitution.’ This article explores Dicey’s claim against the backdrop of the legal events that followed Governor Edward John Eyre’s proclamation of martial law in reaction to the Jamaica uprising of 1865 and his ruthless suppression of the uprising. It might seem that these events, as well as later experience, show that Dicey was naïvely wrong. But the article argues that a proper understanding of the jurisprudential issues and of that experience support his view.*

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In a truly violent, authoritarian situation, nothing is more revolutionary than the insistence of a judge that he exercises . . . a ‘jurisdiction’ [to sit in judgment over those who exercise extralegal violence in the name of the state] – but only if that jurisdiction implies the articulation of legal principle according to an independent hermeneutic. The commitment to a jurisgenerative process that does not defer to the violence of administration is the judge’s only hope of partially extricating himself from the violence of the state. (Robert Cover)<sup>1</sup>

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1 Robert Cover, ‘Nomos and Narrative’ in Martha Minow, Michael Ryan, & Austin Sarat, eds., *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1998) 95 at 162 [Cover, ‘Nomos and Narrative’]. The words in square brackets come from the preceding sentence in Cover’s text.

The threat of martial law was an essential resource for the officials who maintained the British Empire, as they sought to defend imperial interests in the midst of an often very hostile local population. In invoking the threat, and, on occasion, martial law itself, the officials drew on examples from England's own earlier history, when martial law facilitated the executive's suppression of internal challenge, and on very recent examples from Ireland, which, though not technically a colony, was treated in many ways as such.<sup>2</sup> While martial law is not invoked today in established liberal democracies, it has clear analogues in declarations of states of emergency, in legislative delegations of authority of virtually unlimited scope to the executive to deal with threats to national security, and in assertions of inherent jurisdiction by the executive to respond as it sees fit to such threats.

Martial law presents a puzzle, one raised also by its analogues, in that its proclamation combines two features of law that in its case turn out to be contradictory. To use Robert Cover's terminology, assertions of legal authority are at the same time 'jurisgenerative' – they constitute a field of legal meaning – and 'jurispathic' – they kill off alternative fields.<sup>3</sup> The case of martial law is special because the field of meaning that is killed off by its proclamation is the narrative of the rule of law, and to kill off that narrative might seem tantamount to killing off law itself. The state – that is, the officials who act in its name – is legally authorized to act without any legal controls. Of course, those who regard martial law or something like it as inevitable in times of severe political stress want to justify it as only a temporary killing off of law – a suspension. They also say that the acts done under martial law are both lawful – done according to law – and in the long-term interests of legal order.<sup>4</sup> On their view, martial law is not a complete absence of law, nor is it a special kind of law – a scheme of legal regulation. Rather, it is an absence of law prescribed by law under the concept of necessity – a legal black hole, but one created, perhaps even in some sense bounded, by law.

2 I am grateful to Brian Simpson for two attempts to educate me on Ireland's anomalous and changing status. See further Kevin Kenny, 'Ireland and the British Empire: An Introduction' in Kevin Kenney, ed., *Ireland and the British Empire* (Oxford: Oxford University Press, 2004) 1 at 7–8. Simpson also pointed out to me that if I maintained my initial characterization of Ireland as 'the colony closest to the imperial centre,' then Scotland would have a better claim to be that colony, though a different history meant that the Scots were not treated to the same degree like an overseas colony.

3 Cover, 'Nomos and Narrative,' supra note 1 at 102, read with 109 and 139.

4 See, e.g., Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven, CT: Yale University Press, 2006).

However, even on these terms the use of law to kill off law for the sake of preserving legal order presents a conceptual puzzle – ‘Is martial law really law?’ – one that has obvious echoes in post-9/11 debates. Moreover, as we know from these debates, the puzzle has important political implications. For example, if officials cannot be legally authorized to act outside of the rule of law, those subject to such acts are thought to be entitled to a judicial declaration that the officials acted illegally, and so, if the illegal act is a detention, they are entitled to be set free, unless there has been a constitutionally valid suspension of *habeas corpus*.

This puzzle is at the heart of my article. Notice that, in the passage that forms the epigraph to this essay, Cover talks about the judge’s commitment to a jurisgenerative process manifested in a challenge to ‘extralegal violence in the name of the state.’ Cover has martial law and its analogues in mind.<sup>5</sup> He does not choose, at this moment, to cast the problem as a clash between legal narratives: the narrative of the lawyers for the state, who will argue that the violence was perfectly legal, and the narrative of the lawyers for the victims of the violence, who will argue that the violence was extra-legal and, thus, that the officials lacked authority. Rather, he casts the clash as one between jurisgeneration and extra-legal action.

This is significant because Cover generally regards a judicial assertion of jurisdiction as an assertion of authority over legal meaning that is inherently jurispathic,<sup>6</sup> re-enacting the moment of violence that he believes both to lie at the foundation of any legal order and to be ignored by most legal scholars.<sup>7</sup> ‘Every legal order,’ he says, ‘must conceive of itself in one way or another as emerging out of that which is unlawful.’<sup>8</sup> However, in the case where judges resist the invocation of martial law, he talks about the possibility of a different kind of jurisdiction, a ‘natural law of jurisdiction that might supplant the positivist version.’<sup>9</sup>

My article explores that possibility. In the next section, I set out in some detail the puzzle martial law presents. I then sketch a concrete example from the nineteenth century that provides a rich context for drawing out the theoretical implications of the puzzle. The implications are discussed in two separate sections, one devoting itself to the nineteenth-century debate, the other bringing that debate into the present in a discussion of a post-9/11 debate. I conclude with some reflections

5 See Cover, ‘Nomos and Narrative,’ supra note 1 at 161, referring among other things to Taney’s resistance to Lincoln in *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

6 See Cover, ‘Nomos and Narrative,’ supra note 1, esp. at 156.

7 Ibid. at 104–5. These others are usually critics of liberalism, for example, Carl Schmitt, Walter Benjamin, Jacques Derrida, and, more recently, Giorgio Agamben.

8 Ibid. at 118.

9 Ibid. at 161.

on the relationship between narrative, violence, and the law<sup>10</sup> in a post 9/11 world, one that might be better understood as a post-colonial world still struggling with the idea and the reality of empire.

ii *Dicey's constitutional paradox*

In what is still the most famous work on the English constitution, A.V. Dicey claims that the common law does not know martial law, by which he meant an executive prerogative to act as it sees fit in times of emergency. “Martial law,” he writes, ‘in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England.’<sup>11</sup> ‘This,’ Dicey says, ‘is unmistakable proof of the permanent supremacy of the law under our constitution.’<sup>12</sup>

Dicey’s claim is somewhat ambiguous between ‘martial law is not something that has occurred within the constitutional order’ and ‘martial law is precluded by the constitution,’ but he clearly intended the latter meaning. According to him, the English constitution recognizes martial law only in two other, very different senses. There is the law that governs the military, both in war and in peace, and there is the common law defence of necessity, which can be invoked by any citizen who responds appropriately to an immediate threat to peace and order. When it comes to the defence of necessity, the question of whether the response was appropriate, and therefore not illegal, is one for the courts to decide according to established common law criteria.

However, Dicey also recognizes that in times of emergency there might be legitimate recourse by officials to illegality, that is, to actions that cannot be justified by the defence of necessity. It is this category of morally justified but illegal acts that an act of indemnity, properly so called, is meant to cover. The fact that such a statute, one that retrospectively grants criminal and civil immunity to officials for their acts, amounts to the ‘legalisation of illegality’<sup>13</sup> is for him proof of his claim that the English Constitution does not know martial law.

10 To use the apt title given to the collection of some of the most important of Robert Cover’s essays, *supra* note 1.

11 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1924) at 283–4 [citations omitted; Dicey, *Law of the Constitution*]. I use this edition because it is the last to contain Dicey’s Note X on ‘Martial Law in England During Time of War or Insurrection’ (at 538–55). For a similar claim to Dicey’s, see Frederic Harrison, *Martial Law: Six Letters to ‘The Daily News’* (London: The Jamaica Committee, 1867) at 13 [Harrison, *Martial Law*], and his quotations at 12–3 from authorities to the same effect.

12 Dicey, *Law of the Constitution*, *supra* note 11 at 283–4.

13 *Ibid.* at 233.

One practical consequence of Dicey's position is that any trial of an individual who is not subject to martial law in the sense of the law that governs the military, that is, anyone who is not a member of the military forces, must be conducted by the ordinary civil courts. So trial of civilians by military tribunals during times of stress is constitutionally precluded, and the idea that such individuals could be tried on capital offences by such tribunals at a time when they posed no immediate threat is an even greater constitutional abomination. For example, the system of military tribunals set up by the US Congress<sup>14</sup> in response to the Supreme Court's decision in *Hamdan v. Rumsfeld*<sup>15</sup> would, on Dicey's view, be just as unconstitutional in England if enacted by Parliament as was the attempt to set up such a system by executive order, which the Supreme Court declared invalid in that case. So what seems an open question in the United States, despite the entrenched constitutional protection for *habeas corpus* and due process in the US Bill of Rights, is closed in the United Kingdom, a country where such protections are to be found only in the 'judge-made constitution,'<sup>16</sup> as Dicey called it – that is, in the common law.

If that question is closed in England, it would follow for civil libertarians that Dicey was right that a judge-made constitution is superior to a written constitution. He argued that in the former the rights are part of the ordinary law and do not 'depend upon the constitution,' since the 'law of the constitution is little else than a generalisation of the rights which the Courts secure to individuals.' Under a written constitution, Dicey elaborates, the general rights it guarantees are 'something extraneous to and independent of the ordinary course of law,' hence subject to suspension.<sup>17</sup> In contrast, if the right to individual freedom is 'part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation.'<sup>18</sup>

Of course, the very thought that a judge-made constitution is superior because it has these results depends on the adoption of a civil libertarian perspective, though one that does not say that it is better to have justice even if the cost is that the heavens fall. Rather, such a perspective considers that the maintenance of such liberties is better able to preserve the heavens. In other words, it places a kind of consequentialist bet, as Dicey makes clear when he rejects the idea that the doctrines of political expediency or necessity justify the imposition of martial law. The idea

14 *Military Commissions Act of 2006*, 28 U.S.C.A. § 2241(e) (Supp. 2007).

15 548 U.S. 557, 126 S. Ct. 2749 (2006).

16 Dicey, *Law of the Constitution*, supra note 11 at 192.

17 *Ibid.* at 196.

18 *Ibid.* at 197.

amounts, in his view, to the claim that ‘at a great crisis, you cannot have too much energy,’ which, he says, is a ‘popular delusion’: the activity of ‘public spirited despots would increase tenfold the miseries and the dangers imposed upon the country by an invasion.’<sup>19</sup>

That bet, however, might seem naïvely parochial, even wilfully blind, because it is made from the perspective of the relatively untroubled political history of an island nation, and, in Dicey’s time, the experience of the colonies, including Ireland, had for many other Englishmen proved that martial law was on occasion necessary to maintain order. Indeed, Dicey had to deal with apparent counter-examples from England’s own constitutional history – recourse to martial law allegedly based on a constitutional prerogative of the Crown that had gone unpunished, as well as the *habeas corpus* suspension acts that had been passed during times of perceived emergency.

Moreover, Dicey’s point about indemnity acts and illegality, while fine as a matter of logic, does make his claim about the unconstitutionality of martial law rather hollow. If there were such a thing as martial law in the sense of an executive prerogative to do what the executive deemed fit in order to deal with threats, everything the executive did would be legal, and so Dicey is right that there would be no need for after-the-fact legislative indemnities. But, as he himself notes, indemnity acts regularly follow official resort to illegality in times of stress, and their terms are up to the legislature; that is, indemnity acts can cover and have, in fact, at times covered everything that the executive did. Thus it seems that even if the executive cannot find legal authorization in a proclamation of martial law, it can simply resort to illegality and, after the fact, render legal its illegalities by ensuring that Parliament enacts retroactive legalization.

Dicey cannot deny the constitutionality of indemnity acts in the same way that he denies the constitutionality of martial law because of his conceptual commitments. According to Dicey, the sovereignty of Parliament is one of the two features of English political institutions, the other being the rule of law.<sup>20</sup> The principle of parliamentary sovereignty means that Parliament has, ‘under the English Constitution, the right to make or unmake any law whatever; and further, no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.’<sup>21</sup> Even those not familiar with the details of Dicey’s book will likely know of his agreement with Leslie Stephen’s assertion that, were the English Parliament to enact a law requiring that blue-eyed babies be murdered, the preservation of such babies would be

19 Ibid. at 554–5.

20 Ibid. at 179.

21 Ibid. at 38.

illegal, though one would conclude that the ‘legislators must go mad before they pass such a law, and subjects be idiotic before they could submit to it.’<sup>22</sup>

It seems to follow that the two features of English political institutions can work against each other, if Parliament chooses to override the rule of law by explicit statutory enactment. But that would mean, contrary to my earlier suggestion, that courts should invalidate an attempt by executive order to set up a system of military tribunals to try civilians but must uphold as valid such a system when set up by explicit legislation. It also means that the legislature can fix the details of the constitution, since the idea that there could be an unconstitutional but legally valid law seems anathema to one of Dicey’s themes, a familiar one in the common law tradition, that the men whose

labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds more intently on providing remedies for the enforcement of particular rights ... than upon any declaration of the Rights of Man or of Englishmen.<sup>23</sup>

That is, the ultimate test of constitutionality is whether a remedy exists to invalidate an apparently unconstitutional law.

Hence, Dicey’s claim about martial law brings to the surface tensions in his general position that undermine his thoughts about the superiority of the judge-made constitution. They also make paradoxical his assertion that ‘the constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.’<sup>24</sup>

My task here is to show how a proper appreciation of that paradox in fact vindicates Dicey’s claim about the English constitution and martial law, and thus also Robert Cover’s point about judges and jurisgeneration. And it does so even in the imperial context, where that claim seems so vulnerable because of, in Daniel Hulsebosch’s words, the ‘fundamental tension of empire ... between the rule of law and the expansion of rule, a striving toward universals of government and rights on the one hand and toward increasing territorial jurisdiction on the other.’<sup>25</sup> As Hulsebosch notes, in America the first striving came about because of a colonial resistance premised on an ‘intellectual transformation in the idea of the rule of law’ – ‘the shift from jurisdiction to jurisprudence,

22 Ibid. at 79, quoting Leslie Stephen, *Science of Ethics* (1882) at 143.

23 Ibid. at 195.

24 Ibid. at 197.

25 Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005) at 10 [Hulsebosch, *Constituting Empire*].

the rules in a legal system to the rule of law, English liberties to American liberty.<sup>26</sup> But the context I will examine is particularly interesting because it required the English to engage in some soul-searching about their commitment to liberty at home.

### iii *The jurisprudence of power*

The title of Part iii is adapted from that of Rande Kostal's monograph on the political uproar in England that followed the ruthless suppression unleashed by Governor Edward John Eyre's proclamation of martial law in reaction to the Jamaica uprising of 1865.<sup>27</sup> The abolition of slavery had begun just thirty-two years before, and former slaves and their descendants lived in conditions of dire poverty, recently exacerbated by a government scheme to clear squatters from land that planters wanted to use for sugar production. In October 1865, a protest outside the courthouse in Morant Bay, a town in Jamaica, turned violent. The locus of the protest is important because the courthouse was a focal point for tension between blacks and whites. The decisions of the mostly white magistrates were correctly perceived as biased by poor Jamaicans involved in property disputes with white planters. Indeed, the Royal Commission that later reported on the uprising found that lack of confidence in the courts was, with the desire to obtain land, the most significant cause of the uprising.<sup>28</sup>

After a period of building tension between the blacks, led by a local preacher, Paul Bogle,<sup>29</sup> and whites led by the local magistrate, Baron Maximillian von Keyelholdt, Bogle and his group killed the magistrate and seventeen others and wounded around another thirty; nearly all the victims were white. Eyre, mindful of the fact that there were 13 000 whites living among 430 000 blacks and people of mixed race, declared martial law in the Morant Bay area and sent troops to suppress the insurrection. While the rebellion was effectively over in a few days, Eyre

26 Ibid.

27 Rande Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005) [Kostal, *A Jurisprudence of Power*].

28 See John Fabian Witt, 'Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)' (2007) 120 Harv.L.Rev. 754 at 776–7 [Witt, 'Anglo-American Empire'], relying particularly on Thomas C. Holt, *The Problem of Freedom: Race, Labor, and Politics in Jamaica and Britain, 1832–1938* (Baltimore, MD: Johns Hopkins University Press, 1992), and Diana Paton, *No Bond But the Law: Punishment, Race, and Gender in Jamaican State Formation, 1780–1870* (Durham, NC: Duke University Press, 2004) [Paton, *No Bond But the Law*]. Kostal focuses on the element of legal dissatisfaction in *A Jurisprudence of Power*, supra note 27 at 95–8.

29 Bogle was a cousin of and advisor to a defendant whose case of trespass was to be heard the day before the uprising started. See Paton, *No Bond But the Law*, supra note 28 at 175.



maintained martial law for a month, during which time his forces killed 439 blacks (who were shot either on the spot or after a perfunctory court martial), flogged 600 black men and women, and destroyed about 1 000 cottages and huts.

The event that loomed largest in the aftermath was the ‘trial’ of George William Gordon. Gordon was an educated, half-caste landowner, former magistrate, and a member of the Jamaica House of Assembly. At the time of the declaration of martial law he was in Kingston, a town not covered by the declaration, for medical treatment. While he had no hand in the uprising, he had prior to it been Eyre’s political bane. Learning that his arrest was imminent, Gordon turned himself in. Eyre had him transported – today we might say ‘extraordinarily rendered’<sup>30</sup> – to Morant Bay, where he was found guilty of treason without any proof of his involvement in the uprising and without his being allowed to make a proper defence. When Eyre refused to stay the sentence of execution, it was carried out.

Eyre made no secret of what he and his officials had done, convinced that in the precarious situation of white colonial rule over a large population of impoverished black inhabitants, it was not only constitutionally appropriate but also politically necessary that the governor have a prerogative authority, located in the unwritten constitution, to declare martial law and to do whatever it took to put down unrest. Moreover, in Jamaica that constitutional authority seemed to be explicitly confirmed by local statute, and Eyre, once he was sure the unrest had settled, ensured that the local legislature enacted an act of indemnity that generously covered all that he and his officials had done.

Eyre, like other colonial officials, relied on a kind of tacit bargain between government and the military, according to which the military could more or less count on either an act of indemnity or an absence of prosecution or both. However, the fuss that ensued in England both made that bargain explicit and threatened its breach, since the Jamaica Committee was formed in order to bring Eyre to account before the law. The committee came to include John Stuart Mill, T.H. Huxley, and John Bright, one of England’s leading political radicals, and it prompted the formation of the Eyre Defence Committee, which included Charles Dickens, Alfred Tennyson, and Thomas Carlyle. A Royal Commission of Inquiry was sent to Jamaica that issued a report critical of the duration of martial law and the measures adopted to enforce it. Prosecutions within Jamaica of officials and military officers for excessive behaviour failed in the face of white settlers’ domination of the bench. The

30 See Michael Taggart, ‘Ruled by Law?’ Book Review of *A Jurisprudence of Power: Victorian Empire and the Rule of Law* by Rande Kostal, (2006) 69 Mod.L.Rev. 1006 at 1007 n. 7 [Taggart, ‘Ruled by Law?’].

government in England refused to bring criminal proceedings, and the Jamaica Committee thus initiated two private prosecutions – of Eyre on twenty-one counts, including the illegal removal of Gordon to Morant Bay in order to subject him to an illegal trial, and of the two officers who presided over Gordon’s trial, Colonel Nelson and Lieutenant Brand, on the charge of Gordon’s murder.<sup>31</sup> Both of these prosecutions failed.

Kostal’s excellent study contains, in my view, the resources for appreciating the paradox in Dicey’s constitutional theory, because it provides a rich account of what is otherwise a subtext of Dicey’s discussions of martial law – the legal drama of the failed prosecutions of some of the principal actors in the suppression. In the last chapter of his book, Kostal suggests that Dicey’s account of martial law owes much to the arguments of two of the lawyers who sought to bring the officials to justice: the barrister James Fitzjames Stephen, the main legal representative of the Jamaica Committee,<sup>32</sup> and Sir Alexander Cockburn, Lord Chief Justice of England, who made the charge to the jury in the prosecution of Nelson and Black.<sup>33</sup>

Kostal, however, is deeply sceptical of Dicey’s claim about martial law and the English constitution, because he thinks that Dicey, like the lawyers who took up the cause of the Jamaica Committee, failed to

31 There was also a civil action against Eyre for false imprisonment.

32 Leslie Stephen’s older brother, Fitzjames Stephen was appointed in 1869 the legal member of the Indian viceroy’s council and served in India until 1872. From 1879, he served as a High Court judge. On his passage back from India, he reread John Stuart Mill’s political works and then published a critique of them, rejecting both Mill’s arguments for democracy and his utilitarianism, in his important 1873 book *Liberty, Equality, Fraternity* (Chicago: University of Chicago Press, 1991), later recognized as a precursor to Lord Devlin’s critique of liberalism. See generally K.J.M. Smith, ‘Stephen, Sir James Fitzjames’ in *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, May 2006), online: *Oxford DNB* <<http://www.oxforddnb.com/view/article/26375>>.

Dicey was the Stephens’ first cousin – see Trowbridge A. Forde, *Albert Venn Dicey: The Man and His Times* (Chichester: Barry Rose, 1985) at 14. Stephen’s and Edward James’s legal opinion for the Jamaica Committee can be found in William Forsyth, ed., *Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence* (London: Stevens & Haynes, 1869) at 551–63. Stephen reproduced much of the opinion in his *A History of the Criminal Law of England*, vol. 1 (London, 1883; reprint, New York: Burt Franklin, [1964?]) at 207–16, stating (at 207) that Cockburn L.C.J. ‘followed almost precisely the statement of the law given in this opinion.’ The same claim could be made, with even more force, of the argument in Harrison, *Martial Law*, supra note 11.

33 Kostal, *A Jurisprudence of Power*, supra note 27 at 457. Kostal says that Dicey did not credit these influences, a claim that is true of the chapter on martial law in the main body of *The Law of the Constitution*, supra note 11 at 280–90, but false with respect to Note X, which relies significantly on Cockburn and which was written after the edition (the fourth, published in 1893) on which Kostal relies.

resolve, 'or even squarely to confront, a number of thorny issues engendered by martial law.' Among these are whether Parliament could by statute implement martial law and indemnify acts done in its name, while respecting the rule of law; whether, if martial law is a prerogative of the Crown, it can be invoked and implemented while the civilian courts continue to operate; whether 'authorities acting under martial law [are] justified in using *terror* as a means of pacifying a recalcitrant civilian population'; and whether the powers of martial law extend to prisoners and civilian detainees and, if they extend to detainees, whether the detainees are entitled to a military trial prior to punishment.<sup>34</sup>

One could conclude from the failure of the Jamaica Committee that the rule of law is a luxury that stable democracies can afford but other sorts of society cannot – for example, a colonial setting where a small white settler group has to deal with the justified resentments of a much larger black population of former slaves, who still live in circumstances of dire poverty. Moreover, as Kostal suggests, the issue is not simply that the claims of power and survival will prevail over the claims of law. Rather, it is that even in contemporary, stable democratic societies committed to legality, the legal constitution must make room for the claims of power and survival, as is indicated by the fact that the idea that the executive may resort to martial law did not receive any death blow in the aftermath of the Jamaica uprising and, indeed, has thrived since then, in the suppression of unrest in Ireland and other colonies and in the analogues to martial law that have developed in the twentieth and twenty-first centuries.

Indeed, in his magisterial work *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, A.W.B. Simpson says of Dicey's claim about martial law that it is 'grossly and perversely misleading,' since under martial law 'precisely what happens is the suspension of ordinary law, followed by the government of the relevant area by the military.'<sup>35</sup> In particular, Dicey's 'absurd legal theory' cannot account for punishment and reprisal as central techniques of martial law.<sup>36</sup> In sum, Dicey and his fellow enthusiasts of the rule of law cannot deal with the fact that political power will prevail when elites think they are faced with an emergency.

34 Kostal, *A Jurisprudence of Power*, supra note 27 at 457 [original emphasis].

35 A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001) at 60 [Simpson, *Human Rights and the End of Empire*]. I take Kostal's reference to Simpson in *A Jurisprudence of Power*, supra note 27 at 457 n. 138, to be an approving one.

36 See Simpson, *Human Rights and the End of Empire*, supra note 35 at 62–3 and, in general, the chapter 'The Mechanisms of Repression' (at 54–90).

In this respect the analogues are even more depressing for civil libertarians, since, if martial law can be said to have received any death blow, that blow did not come from any victory of lawyers and judges wedded to the same cause as that of the Jamaica Committee. Rather, it came from the fact that martial law need no longer be invoked by the military and the security services, since Parliament in the twentieth century simply provided them with advance statutory authority to do whatever they would have claimed it necessary to do in the past under the cover of martial law,<sup>37</sup> a fact of which there is ample evidence in the post-9/11 era. In short, the executive need no longer rely on the idea of martial law to adopt the kinds of measures Dicey considered unconstitutional. It need merely ensure that it has in place the authority so to act from statute. Thus, one reviewer of Kostal's book seems fully justified in concluding that Kostal shows that it is 'wishful thinking' to remark, as did Dicey just twenty years after the Jamaica uprising, that 'Englishmen are ruled by the law, and the law alone.'<sup>38</sup>

I agree that Dicey's remark is a kind of wishful thinking. But I argue here that such thinking is necessary to make sense of the aftermath of the Jamaica affair – indeed, of much of what Kostal finds remarkable about the story. I also argue that it is wishful not in the sense of bearing little or no relation to reality but in the sense of being an aspirational account of the rule of law, one that seeks to bring reality into line with the principles foundational to its account.

The basis of my argument is the very fact that might seem most undermining of it. If it is wishful thinking to say that 'Englishmen are ruled by the law, and the law alone,' we commit ourselves to the proposition that they are ruled by something else, by the usual contrast between rule under the rule of law and rule by the arbitrary power of the executive.

37 Simpson, *ibid.* at 75–90, chooses 1936 because of the comprehensive nature of the Palestine Martial Law (Defence) Order in Council of 26 September 1936, the making of which was authorized by the Defence of the Realm Acts, introduced during World War I. Simpson remarks that '[w]ith such a code in force who need martial law?' *Ibid.* at 86. But his rhetorical question requires him to accept the correctness of the majority of the House of Lords' decision in *R. v. Halliday, ex parte Zadig*, [1917] A.C. 260, discussed below [*Halliday*], and that acceptance commits him to a normative position he may have no desire to hold. Others would date the statutory introduction of martial law to the Defence of the Realm Acts, beginning in 1914. See Charles Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford: Oxford University Press, 1993), and, for a fine early treatment, Harold M. Bowman, 'Martial Law and the English Constitution' (1916) 15 *Mich.L.Rev.* 93. As I point out below, under the European Convention on Human Rights, member states are subject to some degree of international supervision when it comes to states of emergency.

38 Taggart, 'Ruled by Law?' *supra* note 30 at 1026, quoting Dicey, *Law of the Constitution*, *supra* note 11 at 198.

But while claims of this sort are often made, they are made for dramatic effect, since they almost always boil down to the idea that we are ruled by law, albeit, in times of emergency or alleged emergency, by law that authorizes the executive to do more or less as it pleases. In other words, rule *by* law requires that valid executive acts have a legal warrant. But whether the legal warrant also requires that the executive act in accordance with fundamental principles of the rule *of* law is something contingent, one of the factors making it so being whether the executive regards itself as faced with an emergency. Further, it is a mistake to associate the rule of law with rule in accordance with these substantive principles, because the decision by the executive to rule by law is one that is taken in accordance with the principle of legality, the principle that commits it to acting only when there is a legal warrant. The executive thus meets the threshold for action in accordance with the rule of law when it rules by law.

Of course, there might seem little difference between the situation in which the executive simply claims authority to act arbitrarily and the situation in which it can point to a constitutional/legal basis for such authority. But even those who regard Dicey's kind of position as wishful thinking are reluctant to say that the rule of law is such an empty concept that a commitment by the executive to the principle of legality makes no difference.

For example, Kostal opens his study by pointing out, in two sets of theses, how remarkable it was that the debates and political action in England in response to the Jamaica affair were framed on both sides by legality and sought a resolution in the courts.<sup>39</sup> 'Public sin' was agreed to be 'expunged in courtrooms, not churches,'<sup>40</sup> and the suppression of the uprising became controversial 'because it called into question the moral – hence legal – integrity of the English people.' And it did so not merely because of the reign of terror but also because of the claim of those who imposed it that 'what they had done was completely *lawful* under martial law.'<sup>41</sup> While the Jamaica Committee failed to procure a 'decisive legal precedent,' it did cause the 'English governing class to confront the contradiction between the love of power and the love of law,'<sup>42</sup> and in this confrontation, that class proved itself more willing than other contemporary elites to 'engage in a vigorous if ultimately indecisive reassessment of their jurisprudence of power.'<sup>43</sup> But in all of this, Kostal says, English constitutional law 'operated less as a body of substantive

39 See Kostal, *A Jurisprudence of Power*, supra note 27 at 18–21. In what follows I draw from Kostal's twenty theses the remarks most pertinent to my themes.

40 Ibid. at 20.

41 Ibid. [original emphasis].

42 Ibid. at 19.

43 Ibid. at 21.

principles than as a reservoir of legal narratives about state power and its proper limits and constraint.<sup>44</sup>

These remarks, however, are as open to question as we have seen. Kostal supposes Dicey's position to be. Were the two narratives equally valid as claims about what the law (the rule of law) required, or was the one that sought to justify Eyre and his officials, in substance, a discourse of power seeking to cover itself with a thin veneer of legality? If that discourse was not merely a discourse of power disguised by legality, do not the outcomes of the Jamaica affair show that it, rather than the discourse favoured by the Jamaica Committee, is the authentic discourse of the law, one that doomed the efforts of the committee to failure? Or was the committee's failure the result not of the rule of law but of the fact that 'English law lacked an effective mechanism for the resolutions of constitutional conflict'? Kostal suggests, that is, that the private criminal prosecution, while it gave access to the courts, was not a good means of 'pursuing abstract legal and political goals,' with the direct result that the 'practical concerns and sympathies of English grand juries' derailed the 'constitutional aims of the Committee.'<sup>45</sup>

In sum, Kostal, no less than Dicey, fails 'squarely to confront a number of thorny issues engendered by martial law'; in particular, whether the English constitution did contain the substantive principles that the Jamaica Committee, James Fitzjames Stephen, Sir Alexander Cockburn, and Dicey thought it did. Of course, a historian is not obliged to take sides in a conflict whose nuances he wishes to describe. But, as we will see, Kostal signals that Eyre's supporters had the better of the legal argument. If the issue was one about rhetoric and narratives rather than constitutional substance, the Jamaica Committee's hopes for the rule of law were vain. However immoral Eyre and his officials were, and Kostal is unsparing in his description of their excesses, Kostal often suggests that the fact of the matter was that if colonial officials were to deal legally with the resentful populations they governed, martial law was a necessary evil from the perspective of these charged with the imperial mission. As Kostal points out, this fact seems to have prevailed in Lord Chief Justice Cockburn's charge, leading him to undercut his own argument at crucial points,<sup>46</sup> as well as in Stephen's courtroom addresses, as Stephen expressed personal sympathy for the plight of Eyre and his officials, refusing to impugn their personal motives, at the same time as he argued that they were guilty of murder.<sup>47</sup>

44 Ibid.

45 Ibid. at 19.

46 Ibid. at 337–41.

47 Ibid. at 303–15.

But Kostal also suggests that the debate in England was a genuine one about what martial law meant, a product of the way the principal actors accepted that the political and moral issues should be channelled into and resolved within the legal order. And, as I have indicated, he cannot in the end resist taking sides in that debate, despite his view that historians should avoid normative judgements. The point I want to make, however, is not just about the predicament of one *legal* historian, that is, a historian who wishes to make sense of the special role of law in a particular context. It is that Kostal's position in the debate about martial law comes about because it is very difficult, perhaps even impossible, to avoid taking sides in this debate, given that at its heart is a contest about the very nature or point of legal order.

The only way of trying to avoid this predicament is to argue that if there were any immorality to be condemned in the Jamaica affair, it resided in the colonial project itself, which, as John Stuart Mill, a former official of the Dutch East India Company, once remarked, required a 'vigorous despotism.'<sup>48</sup> As Michael Taggart points out in the review mentioned above, there is something mighty odd about Mill's position as leading light of the Jamaica Committee, since he was a fervent advocate of colonialism, but the circumstances of the colonial project made inevitable such events as the excesses involved in the suppression of the Jamaica uprising.<sup>49</sup>

On this argument, the confusions on both sides of the Jamaica debate arise because the English governing elites combined their love of power, as evident in the imperial project, with their love of law, as evident in their commitment to governing their exercise of power by law. The elites should have treated imperialism as a vast exception to the way they governed at home: rule of law in England, arbitrary power elsewhere. But even this argument fails to avoid the predicament, for three reasons.

First, the argument takes sides in supposing that rule by law requires the rule of law – Dicey's rule of substantive constitutional principles – because it assumes that if one wishes to avoid subverting the rule of law in the imperial context one must avoid governing by law. Second, that the empire would be governed by law was an important, even crucial, idea in the legitimation of empire – the conception of the project of empire as the white man shouldering his burden of bringing civilization, including the rule of law, to less fortunate peoples.<sup>50</sup>

48 Quoted in Taggart, 'Ruled by Law?' supra note 30 at 1012.

49 Ibid. at 1011.

50 This burden is a prominent theme in a recent, rather cheery appraisal of the British Empire, presented as a model for American world domination: Niall Ferguson,

Third, as Kostal forcefully points out, the governing elites were estopped from making this exception, because there was no way of confining it with any integrity to the colonial context. The Jamaica Committee was motivated by the same spirit that lay behind the anti-slavery movement, and its members were genuinely appalled by Eyre's excesses. However, the committee was motivated equally, and perhaps even more, by the issue of legal integrity at home. If rule by law permitted Eyre to do what he had done in Jamaica, it also permitted governing elites at home to do the same. In Kostal's words, '[t]he question of the day was not whether martial law justified the execution of Gordon, but whether martial law in England would justify the execution of [the political radical] John Bright.'<sup>51</sup> It was no coincidence that the leaders of the Jamaica Committee were also leading the fight 'for the greater accountability of Parliament to male voters,' while the leaders of the Eyre Defence Committee were among those who most 'loudly' opposed a 'more democratic suffrage.' Thus 'reform of the franchise and the Jamaica affair raised the same question: what was the nature of legal accountability in a constitutional state?'<sup>52</sup> Moreover, agitation over reform had recently led to the deployment of 2 000 police who used violent means to clear Hyde Park of pro-reform demonstrators, an incident which, while 'small beer' compared to Jamaica, showed the potential for state repression of political dissent.<sup>53</sup>

In Part iv below, I analyse in some detail some of the central legal arguments made in the Jamaica affair, in order to bring to the surface the different jurisprudences of power to which each narrative was committed. I argue that only the position represented by Stephen and Cockburn, and later elaborated by Dicey, makes sense of the idea that there could be a jurisprudence of power.

#### iv *The charges to the grand juries*

Because the prosecutions had to be brought at private initiative, English law required a three-stage procedure.<sup>54</sup> At the first stage, the complainants had to present their charge in a magistrate's court and were obliged to show cause why the accused could be compelled to attend the court on an arrest warrant or summons. If the magistrate was satisfied that there was a case to answer, he would issue a bench warrant for the arrest of

*Empire: The Rise and Demise of the British World Order and the Lessons for Global Power* (New York: Basic Books, 2004) [Ferguson, *Empire*].

51 Kostal, *A Jurisprudence of Power*, supra note 27 at 190.

52 Ibid. at 133.

53 Ibid. at 162.

54 Here I follow, almost verbatim, *ibid.* at 277.



the accused. There followed a ‘committal hearing’ in which the prosecution had to establish a *prima facie* case of guilt. Before evidence was called, the accused was entitled to challenge the form of the charge or the jurisdiction of the court and to cross-examine prosecution witnesses on the admissibility or sufficiency of their evidence. If the magistrate was satisfied that the prosecution had made out a sufficient case, and if the charge was one of felony, then, at the second stage, the indictment was submitted to a grand jury for review in light of a charge to the jury by a judge. Only if the jury found a ‘true bill’ of indictment would the third stage – a full jury trial of the case – ensue.

I will deal first with Sir Alexander Cockburn’s charge in the case of the officials who had presided over the court martial of George Gordon and then with the charge by his brother judge, Mr Justice Blackburn, in Eyre’s case. As we will see, Blackburn J. tried to establish a middle ground between Cockburn L.C.J. and the more extreme position staked out by the barrister who had, in various publications, taken up Eyre’s cause, W.F. Finlason.<sup>55</sup> Finlason’s view was that once martial law was declared, the executive had unfettered discretion to act as it saw fit. The crucial question, in my view, is whether there is any resting place on what we can think of as a continuum of legality between Cockburn L.C.J.’s Diceyan position (or, more accurately, Dicey’s Cockburnian decision) and Finlason’s. Further, if there is none, should we conclude that Cockburn L.C.J.’s position collapses into Finlason’s, with the result that the English constitution does and must know martial law?

That the Lord Chief Justice of England would go the Old Bailey to charge a grand jury was ‘not a routine matter.’<sup>56</sup> But, as Cockburn L.C.J. began his charge to the jury by indicating, he felt that his presence was required because the case was ‘one of the greatest difficulty as well as of importance.’<sup>57</sup> He clearly intended to settle the great questions of martial law: Who has authority to proclaim it, and what is it that is proclaimed by the one who has authority? In the case, these questions resolved themselves into whether Eyre had authority to proclaim martial law and, if he did, whether the army officers Nelson and Brand

55 It is not clear why Finlason, who was neither a prominent barrister nor a political figure, became so embroiled in the debate. See Kostal, *ibid.* at 228–30.

56 *Ibid.* at 324.

57 Frederick Cockburn, ed., *Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court, in the Case of The Queen Against Nelson and Brand* (London: William Ridgway, 1867) at 3 [Cockburn, *Charge of the Lord Chief Justice*]. Cockburn L.C.J. did not read the charge but spoke from notes, and it took him almost six hours to deliver it; see Kostal, *A Jurisprudence of Power*, *supra* note 27 at 325. The text was taken from the shorthand writer’s notes, which were then revised and corrected by the judge with the aid of his brother, the editor. Cockburn L.C.J. also added occasional notes, which are indicated in the text by his initials.

had authority by that proclamation to try Gordon, and thus whether his execution amounted to wilful murder.<sup>58</sup>

Eyre's authority had to have its source, Cockburn L.C.J. said, either in the commission he had received from the Crown or in an imperial or local statute.<sup>59</sup> The question of whether he had such authority by Commission of the Crown was thus the 'great constitutional question – Has the Sovereign, by virtue of the prerogative of the Crown, in the event of rebellion, the power of establishing and exercising martial law within the realm of England?'<sup>60</sup> Of course, the question would never arise in England, Cockburn L.C.J. assured his audience, and if it did, the government would be a wise government and apply to Parliament for legislation authorizing the actions it considered necessary.<sup>61</sup> However, they were in court not to consider policy, whether there 'ought to be such a thing as martial law or not: the question for us is whether there is such a thing.'<sup>62</sup>

At this point, Cockburn L.C.J. made plain his distaste for Finlason's doctrines, which he said were of the 'wildest and most startling character' and which, if true,

would establish the position that British subjects, not ordinarily subject to military or martial law, may be brought before tribunals armed with the most arbitrary and despotic power – tribunals which are to create the law which they have to administer; and to determine upon the guilt or innocence of persons brought before them, with a total disregard of all those rules and principles which are of the very essence of justice, and without which there is no security for innocence.<sup>63</sup>

He was not exaggerating; he quoted ample extracts from Finlason's *Treatise on Martial Law* that emphasized that martial law was the law of the will of the military, something entirely unconstrained and arbitrary.<sup>64</sup> Because, Cockburn L.C.J. said, these were 'detestable' doctrines, 'repugnant to the genius of our people, to the spirit of our laws and institutions, to all which we have been accustomed to revere and hold sacred,' it was essential to see whether there was sufficient legal authority for them.<sup>65</sup>

58 Cockburn, *ibid.* at 8–9.

59 *Ibid.* at 9. I will not deal with Cockburn L.C.J.'s discussion of the legal status of Jamaica (at 10–9), which issued in the conclusion that its inhabitants are 'entitled to all the rights and liberties to which the subject is entitled at home.' *Ibid.* at 19.

60 *Ibid.* at 20.

61 *Ibid.* at 20–1.

62 *Ibid.* at 21.

63 *Ibid.* at 22.

64 *Ibid.*, quoting W.F. Finlason, *A Treatise on Martial Law: As Allowed in Time of Rebellion; with Practical Illustrations Drawn from the Official Documents in the Jamaica Case and the Evidence Taken by the Royal Commission of Enquiry with Comments, Constitutional and Legal* (London: Stevens & Sons, 1866) at 107 [Finlason, *Treatise on Martial Law*].

65 Cockburn, *Charge of the Lord Chief Justice*, *supra* note 57 at 23.

Cockburn L.C.J. proceeded to argue that all supposed examples of the exercise of martial law, that is, cases where men were put to death or punished with ‘some form of trial’ and thus not deaths ‘in the field,’<sup>66</sup> were examples of illegality, something made plain by the Petition of Right, the statute that in 1627 put an end to attempts in England to exercise martial law by virtue of the prerogative.<sup>67</sup> That statute, he argued, was not an ‘enacting statute’ with application only to England; it did not place any ‘new limitation upon the prerogative of the Crown’ but simply declared ‘where, according to the law and constitution of this country, the prerogative of the Crown ends and the rights and liberties of the subject begin.’<sup>68</sup>

Cockburn L.C.J. admitted that the claim about the end of prerogative-based martial law could not be made about Ireland. But he pointed out that there the illegality of the exercises had been recognized through the enactment of acts of indemnity and that, after the famous case of Wolfe Tone,<sup>69</sup> prior statutory authority was sought for the powers the executive thought it required. In this regard, he said that ‘nobody can deny for a moment the power of Parliament to enact that martial law shall be put into force.’<sup>70</sup> It might, as I have already suggested, seem to give the game away to admit that what cannot be constitutionally done by prerogative can be done by statute, but Cockburn L.C.J. had two further

66 Ibid. at 24–47, 24–5. I take it that Cockburn L.C.J. wished to distinguish between the situation in which someone is shot during the course of a riot and the case in which someone is killed after he has been arrested. I discuss the point of such distinctions below when I explain why military trials of civilians are a particular anathema to the rule of law, even though they may be far from being the morally worst thing done in the name of martial law.

67 Ibid. at 45.

68 Ibid. at 65.

69 Tone was a prominent figure in the Irish Rebellion of 1798, a rebellion that provoked a proclamation of martial law. He had been in France to raise support for a French invasion and was captured on board one of the French ships. He was tried and sentenced to death before a court martial. He asked that, as a soldier, he might be shot rather than hanged. This request was refused, and his father made an application to the Court of King’s Bench in Dublin for *habeas corpus* on the ground that he had been sentenced to death by a court martial and that the court martial was illegal, since the ordinary courts were sitting and thus retained jurisdiction. The Court granted *habeas corpus* in the face of the military’s determination to execute Tone, even ordering the arrest of the officer commanding the barracks where Tone was held. But when the sheriff arrived at the barracks to serve the writ, he found that Tone was already dying – he had slit his throat in order to avoid the shame of a hanging. For a fuller account see Cockburn, *Charge of the Lord Chief Justice*, supra note 57 at 51–3; for a more contemporary account see Marianne Elliot, ‘Tone, (Theobald) Wolfe’ in *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, January 2008), online: *Oxford DNB* <<http://www.oxforddnb.com/view/article/27532>>.

70 Cockburn, *Charge of the Lord Chief Justice*, supra note 57 at 49–57, 53.

arguments to add to his first argument that the executive cannot rely on a constitutional authority but must get its authority from the legislature.

The second argument resides in his point that one of the advantages of seeking Parliamentary authority is that

restrictions and conditions can be placed on the exercise of this anomalous jurisdiction [such] as may insure the observance of those things which are essential to justice, and which tend to secure it from those disturbing influences which in times of public commotion are too apt to operate on the mind of those who may be called on to administer this rude and hasty justice, and to lead them to arbitrary and rash decisions.<sup>71</sup>

Now, this second argument might seem but a pious hope. However, as I will now show, it is best appreciated in conjunction with the third argument – Cockburn L.C.J.’s analysis of the Jamaica legislation on which Eyre and the officials relied. For Cockburn L.C.J. argued that the correct way to interpret general statutory authority to declare martial law is that such authority is bounded by specific understandings of martial law, as found in statutes, the common law, and authoritative pronouncements by lawyers.

One of the first statutes made after the legislature of Jamaica acquired from the Crown the power to make permanent statutes had as its purpose to establish a militia in Jamaica, as there was no standing army. It provided that if the commander-in-chief apprehended public danger or invasion, he was to call a council of war and, with their advice and consent, command the Articles of War to be proclaimed, ‘[u]pon which publication the martial law is to be in force.’<sup>72</sup> The act concluded with the proviso that nothing within it could give any official authority to do ‘any act or thing contrary or repugnant to the known law of England or this island,’<sup>73</sup> which meant, Cockburn L.C.J. asserted, that it was subject to the Petition of Right.<sup>74</sup>

Cockburn L.C.J. recognized that governors of Jamaica had in fact exercised martial law ‘in the amplest sense of the term’ since the enactment of this statute, believing that they had authority from the statute or from their commission.<sup>75</sup> But his view was that the statute gave them no such authority; it was simply a statute enacting that once a militia had been raised, it would be governed by military law, a claim that was not only in accordance with authority but also reinforced by the proviso about the law of England.<sup>76</sup>

71 Ibid. at 53.

72 Ibid. at 75–6.

73 Ibid. at 75–7. For a full statement of the text of the proviso see Harrison, *Martial Law*, supra note 11 at 20.

74 Cockburn, *Charge of the Lord Chief Justice*, supra note 57 at 78.

75 Ibid.

76 Ibid. at 77–8.

The second statute he considered, also a militia act, made it clear, in his view, that while the governor could proclaim martial law only with the assent of a council of a war, and for periods of thirty days at a time, once he had that assent, he had the powers of martial law 'in the largest sense.'<sup>77</sup> This could not be the common law of necessity, which left two possible senses. It was either the law applicable to the military 'applied to the civilian' or a 'shadowy, uncertain, precarious something, depending entirely on the conscience, or rather on the despotic and arbitrary will, of those who administer it.'<sup>78</sup>

The substantive law applicable to the military was not, however, arbitrary or uncertain; rather, it was 'precise, specific, definite.'<sup>79</sup> The same was true of military procedural law, with the exceptions of the 'drum-head court martial,' which seemed closer in approach to what is called martial law but which, Cockburn L.C.J. asserted, had fallen into disuse, and of a summary procedure under the Mutiny Act, but such a court did not have the power to pass sentence of death.<sup>80</sup> Subject to these two exceptions, this kind of military law demanded the same standards as an ordinary court of justice, save for the fact that an accused could not be represented by a lawyer of his choice, a defect but one that had until quite recently also attended civilian trials on capital offences.<sup>81</sup> So if that were the martial law applicable to the soldier, Cockburn L.C.J. asked, why was something different claimed to be applicable to the civilian?<sup>82</sup> Apart from what he called the 'reckless assertions of Hume,'<sup>83</sup> the major contribution to this idea came not from authority but from 'excesses and abuses which have been committed in the exercise of this power.'<sup>84</sup>

That left only the argument that martial law is necessary because of the need for 'summary and terrible' examples. But if such examples were to be made 'without taking the necessary means to discriminate between guilt and innocence,' so that, 'in order to inspire terror, men are to be sacrificed whose guilt remains uncertain,' he trusted that 'no court of justice will ever entertain so fearful and odious a doctrine.'<sup>85</sup>

77 Ibid. at 80.

78 Ibid. at 83–6, 86.

79 Ibid. at 91.

80 Ibid. at 92–7.

81 Ibid. at 98.

82 Ibid. at 99.

83 Ibid. at 104, quoting Hume's remark that martial law is 'a prompt, arbitrary, and violent method of decision.'

84 Cockburn, *Charge of the Lord Chief Justice*, supra note 57 at 105.

85 Ibid. at 108. This claim caused Cockburn L.C.J. some embarrassment at the hands of Finlason, who pointed out that as Attorney General, Cockburn had argued to Parliament after martial law had been declared in Ceylon that when martial law is in force, the 'ordinary criminal tribunals cease to have jurisdiction . . . We don't punish men merely for the offence they have committed. They are punished to deter others

There are considerations more important even than the shortening the temporary duration of an insurrection. Among them are the principles of justice, principles which can never be violated without lasting detriment to the true interests and well being of a civilised community.<sup>86</sup>

In sum, the three arguments are these:<sup>87</sup> the common law constitution does not know martial law in the sense of a prerogative-based unfettered discretion, so any executive authority to act must come from statute; the legislature can enact martial law, but we expect that, if it does so, the powers granted will be carefully circumscribed; and, if that expectation is disappointed, we are entitled to interpret the statute as circumscribing the powers in accordance with the best understandings of martial law from the common law, declarative statutes such as the Petition of Right and the *habeas corpus* acts, and the authority of great lawyers.

In combination, the three arguments are powerful because they leave elites who want to exercise an unfettered discretion with only one option – enacting legislation that very explicitly gives them the specific powers that they want. That option is a difficult one to exercise, because it is likely to attract adverse public criticism, and, moreover, criticism spurred by the fact that the public is uncomfortable with the thought that their society is officially not committed to the rule of law.

Cockburn L.C.J. then expressed the view that if the governor had no power to put martial law into force, it followed both that the court martial lacked jurisdiction and that the execution was the crime of murder. If Nelson and Brand had made an honest mistake about there being jurisdiction when there was none, they would have to hope for a pardon. The ‘law must,’ he said, ‘be vindicated,’ ‘however sorry we may be that gentlemen who have intended to do their duty . . . should be made amenable at the bar of a criminal court for the crime of murder.’<sup>88</sup> And he made plain in a close analysis of the evidence at and process of Gordon’s court martial that much of the evidence that was admitted was inadmissible, that what was admissible was worthless, and

from following their example.’ See W.F. Finlason, ‘Introduction’ to W.F. Finlason, ed., *Report of the Case of The Queen v. Edward John Eyre, on his Prosecution, in the Court of Queen’s Bench, For High Crimes and Misdemeanours Alleged to have been committed by him in his office as Governor of Jamaica; Containing the Evidence, (Taken from the Depositions), the Indictment, and the Charge of Mr. Justice Blackburn* (London: Chapman and Hall, 1868) xxii [Blackburn, *Case of The Queen v. Edward John Eyre*].

86 Cockburn, *Charge of the Lord Chief Justice*, supra note 57 at 108. In addition, he doubted the necessity of such trials.

87 On the assumption, of course, that the situation is not one in which the executive has no time to procure authority from the legislature, in which case, as we have seen, it will have to act and rely on the common law defence of necessity if called to account before the courts.

88 Cockburn, *Charge of the Lord Chief Justice*, supra note 57 at 124–7, 126, 127.

that the process was a complete sham, such that it was as ‘lamentable a miscarriage of justice as the history of judicial tribunals can disclose.’<sup>89</sup>

Given his view of the facts and his account of the law, it might thus seem that Cockburn L.C.J. was virtually directing the grand jury to declare a true bill. But he also, as I have already indicated, said some things that put his whole charge in doubt. He emphasized not only that he had ‘felt deeply sensible of the exceeding difficulty of the task’ of ‘travelling over [the] untrodden ground’ of martial law but also that his views were his alone; he did not have the help of judicial decisions or learned authority or the guidance of other lawyers or judges.<sup>90</sup> He thus injected, as Kostal emphasizes, a serious note of uncertainty into a charge that was meant to clarify the law to the grand jury.

Cockburn L.C.J. proceeded to make matters even worse by arguing that if the jury found that the army officers who presided over Gordon’s trial had jurisdiction, they had to decide whether it was exercised honestly and *bona fide*. That is, assuming that there was jurisdiction, if it looked to the grand jury as though the officials had abused that jurisdiction to get rid of a ‘mischievous and obnoxious character,’ they should find a true bill.<sup>91</sup> While he seemed to indicate that the way the court martial was conducted constituted evidence of dishonesty and bad faith,<sup>92</sup> this argument invited the grand jury to decide the legal questions at stake in the case, and thus he charged them with an interpretative task that was properly his, not theirs.<sup>93</sup> Moreover, he muddied not only his charge on the law but also his charge on the facts by suggesting that he understood why, in the circumstances of the uprising and in light of Gordon’s political record, officials could honestly think both that Gordon was a cause of the uprising and that his punishment would bring an end to the insurrection.<sup>94</sup>

Kostal thus rightly says if there was ever a chance that a jury of twenty-three ‘affluent and (presumably) conservative men’ was going to find a true bill, Cockburn L.C.J. had ‘surely scuttled it.’<sup>95</sup> Kostal may even be

89 Ibid. at 129–54, 154. In a note added later to the text of the address, Cockburn L.C.J. dismissed as ‘most dangerous and pernicious’ a claim made by Finlason that the question in cases such as Gordon’s was one of deterring others through punishment, so that it did not matter whether a man had directly caused a rebellion – ‘only that his death would stop it.’ Ibid. at 154–5, quoting Finlason, *Treatise on Martial Law*, supra note 64 at 61.

90 Cockburn, *Charge of the Lord Chief Justice*, supra note 57 at 127.

91 Ibid. at 128–9.

92 See, e.g., *ibid.* at 129, 137.

93 Ibid. at 152–3. At the end of his charge, Cockburn L.C.J. not only repeated his doubts but stated that the jury had to undertake a ‘review of the authorities’ and of the law in general. Ibid. at 154–5.

94 Ibid. at 152. This point is repeated at the end of the charge, at 156.

95 Kostal, *A Jurisprudence of Power*, supra note 27 at 339.

right in saying that the charge was ‘naïve, even disingenuous.’<sup>96</sup> But he goes too far, in my view, in claiming that the charge is an ‘archetypal study in liberal confusion and self-contradiction about law and empire,’<sup>97</sup> faults made worse by the fact that Cockburn L.C.J., in a post-script to the published edition of the charge, not only ‘accepted the fact of empire and the need to use force to preserve it’<sup>98</sup> but also would not ‘categorically condemn martial law’<sup>99</sup> and ‘made just one recommendation: for the “necessity of legislation if martial law is ever again to be put into force.”’<sup>100</sup> For there is a difference between the incontrovertible claim, on the one hand, that Cockburn L.C.J. fatally undermined his argument with his doubts and with his mistake in charging the jury with interpretation of the law and, on the other, Kostal’s claim that Cockburn L.C.J.’s argument was inherently self-contradictory.

Note that Kostal says that it is not the place of a historical study to say whether Finlason’s account of martial law was ‘correct, or at least more correct’ than Cockburn L.C.J.’s. But he adds that Finlason ‘presented an internally coherent account of the sources’ and that he was ‘more forthright about the implications of empire for constitutional government,’ underlining as he did ‘the indispensability of terror as an instrument of imperial government.’<sup>101</sup> This addition creates a tension in Kostal’s account, since an internally coherent account of the legal sources is by definition better than a self-contradictory one, and, if it has only incoherent rivals, there is every reason to say it is the correct account. As Kostal points out, Finlason charged Cockburn L.C.J. with confusing what the law was with what the law ought to be. He thus, Kostal says, criticized Cockburn L.C.J. from the ‘perspective of legal positivism’ and claimed for himself a presentation of the law as ‘hard fact.’<sup>102</sup>

However, Finlason’s position is more open than Cockburn L.C.J.’s to the charge of internal or self-contradiction. In his first work on martial law, Finlason argued, as we saw Cockburn L.C.J. indicate, that martial law is something entirely arbitrary, uncontrollable by ordinary law. In Finlason’s view, martial law involves the ‘suspension of all law,’ thus conferring ‘an absolute discretion for the doing of anything which possibly could be deemed necessary or expedient.’<sup>103</sup> It follows that anything done during the period of martial law is by definition not illegal.

96 Ibid. at 339.

97 Ibid. at 482–3.

98 Ibid. at 483–4.

99 Ibid. at 367.

100 Ibid. at 483–4, quoting from Cockburn, *Charge of the Lord Chief Justice*, supra note 57 at 163.

101 Kostal, *A Jurisprudence of Power*, supra note 27 at 368.

102 Ibid. at 367.

103 Finlason, *Treatise on Martial Law*, supra note 64 at 107.



Indeed, strictly speaking there was no need for an act of indemnity following a declaration of martial law: even if excessive acts were carried out, this was not something ‘material to their legality,’ and those who did them could not be legally liable.<sup>104</sup>

The position is not incoherent that if the idea of martial law is something different from the law that applies to the military and the law of the defence of necessity, it must amount to the suspension of all law. It is merely an all-or-nothing position, one that asserts that there would be ‘no difference between ordinary law and martial law’ if the ‘governor or military authority’ could be ‘legally liable for what is honestly done.’<sup>105</sup> The problem is not incoherence but the fact that it is difficult to see what role ‘law’ plays in the idea, given that legal authority is universally supposed to be an authority to act only if the law supplies a warrant for one’s act. To put it differently, legal authority is an inherently limited authority: not only must one have jurisdiction to act, but the idea of jurisdiction entails objectively determinable limits, that is, limits determinable by some independent legal authority. In short, Finlason’s position is incoherent as an account of law.

Finlason was acutely aware of this problem and so at times retreated somewhat from his position. He writes, for example, that the power of martial law is ‘absolute’ rather than ‘utterly arbitrary’ and that ‘the military authorities are justified in all means and measures, they really deem necessary; though not in wanton and unnecessary acts of cruelty, which from their nature they cannot have really deemed necessary.’<sup>106</sup> In addition, he claimed that martial law is controlled by the common law, since the common law recognizes martial law as absolute, but only within its jurisdiction, and that its exercise is subject to those ‘dictates of natural justice . . . which the law of England considers as of universal obligation.’<sup>107</sup> He even suggested that ‘the entire and willful non-observance of this great duty might so far invalidate such proceedings as to impose a *criminal* liability.’<sup>108</sup>

Moreover, Finlason does seem at times to provide a basis for enquiring into the validity of both the proclamation of martial law and its implementation. He writes consistently about ‘the lawful proclamation of martial law’<sup>109</sup> and suggests that the validity of a declaration of

104 Ibid. at xvi, and see further at xxviii–ix.

105 Ibid. at 51.

106 Ibid. at xxxvi. Finlason may here be relying on early understandings of absolutism, which regarded the quality of being absolute as virtuous; see James Daly, ‘The Idea of Absolute Monarchy in Seventeenth-Century England’ (1978) 21 *Historical Journal* 227. But how this reliance assists him is unclear.

107 Finlason, *Treatise on Martial Law*, supra note 64 at xxxvii.

108 Ibid. at xxxvii; see further at 87.

109 See, e.g., *ibid.* at 52, 55.

martial law depends on certain facts, for example, that there is a rebellion and no standing army whose might more than suffices to put it down.<sup>110</sup> He says that whether ‘there is or is not a rebellion, is, as our lawyers always held . . . a question of fact; and, still more so, whether it is sufficiently formidable to require martial law for its suppression.’<sup>111</sup> He also frequently asserted that as long as officials act honestly, it does not matter whether they act in error. So, for example, even if it is the case that an official is in fact mistaken as to the existence of a rebellion, if he honestly thinks there is, he acts with full legal authority. This seems to suggest that the official could be legally liable if it could be shown that he did not honestly believe there was the necessity to declare martial law. However, Finlason also emphasized that the legality of a declaration of martial law

depends . . . simply upon the *fact* of its having so been declared; otherwise there could be no security for any one ever acting under martial law, for it is a general principle that if there is no *original* authority or jurisdiction, all who act under it act illegally, and so, if they take life (save in self defence, or in suppression or resistance of actual felonious outrage), are guilty of murder.

If the legality of martial law were made to depend . . . upon the soundness of the judgment exercised in declaring it, in the opinion of other persons, at a great distance, and after the event, and under different, perhaps hostile influences, it is obvious that no one could even venture to declare, or to act upon, martial law, and put in force its terrible powers for the salvation of a colony or a dependency.<sup>112</sup>

As he makes crystal clear in these passages, if the fact of a declaration suffices to ground its legality, there is no scope for second-guessing that fact on any ground.

Finally, Finlason argued that the point of martial law is to avert danger by deploying terror, with any person a legitimate target who is not actively involved in supporting the military.<sup>113</sup> It is unclear what role natural justice could play if this is the point, a fact highlighted by his statement that ‘the governing principle’ of martial law is that its ‘basis’ is ‘*danger* rather than guilt: and the meeting of danger by the exciting of terror.’<sup>114</sup>

In sum, the only way for Finlason to preserve his position from self-contradiction was to stick with the claim about the utter arbitrariness of martial law, which meant accepting that law is not properly part of the

110 Ibid. at iv.

111 Ibid. at xxii.

112 Ibid. at 55 [original emphasis]. See also at xxii (‘It is apprehended that the declaration of martial law, in case of rebellion, is, as an act of State, necessarily valid, although it may be more or less censurable for erroneous judgment’).

113 Ibid. at xxxii, 27.

114 Ibid. at 64 [original emphasis].

concept. It is, to quote him, ‘a state of things in which there is no *law* at all, but the will of the Commanding officer.’<sup>115</sup> The retreats set out above turn out to be no more than his vain wish to have law, properly so called, play a role. The grip of that wish on him is further manifested in his introduction to his edition of Mr Justice Blackburn’s charge in *Eyre’s* case, which fully endorses Blackburn’s position.

Blackburn J.’s position is, at least on the surface, very different from Finlason’s. First, in his charge to the jury, Blackburn J. did not commit himself to the claim that there is a prerogative to proclaim martial law. Even if there were such a prerogative, he did not think that it was as ‘unbounded, wild, and tyrannical’ as ‘some persons have lately been saying that it is,’<sup>116</sup> a reference which must include Finlason, since he was the most prolific and prominent exponent of such claims. Indeed, Blackburn J. suggested that the prerogative, if it existed, was ‘strictly limited to necessity,’ and if that were the test, there could be ‘no reasonable doubt that . . . [Eyre] did exceed much that would be authorized on the most extended view of the prerogative,’ such that if Eyre rested his authority on the common law, the jury would have to find a true bill.<sup>117</sup>

Where Blackburn J. differed from Cockburn L.C.J. was mainly in his interpretation of the Jamaican statutes. With respect to the first statute, he put great emphasis on its provision that when the emergency had passed ‘martial law shall cease and the common law revive.’<sup>118</sup> He did not think that the statute could therefore be limited to permitting the authorities to call out the militia and having military law apply to the militia, since authority to do that had been given in a separate section. In other words, in order to give sense to the idea of the common law’s reviving, he inferred that it had to be entirely suspended, allowing for martial law to be exercised ‘in the fullest sense.’<sup>119</sup>

But this inference is controversial. One could equally argue that the provision about the common law is there to emphasize the transition from control by military law of the militia to the general control of the common law over all of the population, including that part of the population that had formed the militia. Moreover, since the phrase ‘martial law’ was used in both sections, it is logical to infer that it means the same thing in both, and there is also the rule that statutes should be taken to use phrases in accordance with their received common law meaning unless there is good reason to suppose that some other meaning was intended.

115 *Ibid.* at vii.

116 Blackburn, *Case of The Queen v. Edward John Eyre*, *supra* note 85 at 74.

117 *Ibid.* at 74–5.

118 *Ibid.* at 77.

119 *Ibid.* at 79.

More significant is that Blackburn J. failed to mention the proviso that nothing within the statute could give any official authority to do ‘any act or thing contrary or repugnant to the known law of England or this island,’ a significant omission given that he, unlike Finlason, accepted that the Petition of Right applied to Jamaica.<sup>120</sup> And that casts into doubt Blackburn J.’s claim that, in the second statute, martial law meant doing whatever the governor thought necessary, checked only by the requirements that he have the full consent of the Council of War and that martial law operate for only thirty days at a time.<sup>121</sup>

In addition, Blackburn J. noted that the statutes did not define martial law,<sup>122</sup> and he did not himself venture a definition. However, as we have seen, he had laid down one negative condition: martial law is not as ‘unbounded, wild, and tyrannical’ as Finlason and others would have it. Perhaps for that reason, Blackburn J. set out what we might think of today as a proportionality test: ‘If a man of reasonable firmness, self-control and moderation would not have done it, then, I have no doubt, he would have been punishable for the want of that firmness and moderation.’<sup>123</sup>

That question was for the jury to decide, and he made it clear that they should apply his test, putting themselves as much in Eyre’s position as they could, to the question of the proclamation of martial law, the question of its maintenance for thirty days, and the question of the removal of Gordon to Morant Bay to stand trial.<sup>124</sup> In the circumstances, as Finlason approvingly notes,<sup>125</sup> this was a direction to the jury not to find a true bill. They had been told that Eyre had by statute indeterminate powers to do indeterminate terrible things, and rural propertied gentlemen were not likely to balk at finding that, from his perspective, he had acted appropriately.

In giving this direction, Blackburn J. was not far from being disingenuous. Unlike Finlason, he saw law as inherently controlling, so that martial law could not be arbitrary, even if it were created by a valid

120 Contrast Finlason, *Treatise on Martial Law*, supra note 64 at iii n. (a), with Blackburn, *Case of The Queen v. Edward John Eyre*, supra note 85 at 72, read with 77. See Cockburn’s comments on Finlason’s claim, though without specific reference, in Cockburn, *Charge of the Lord Chief Justice*, supra note 57 at 65.

121 Blackburn, *Case of The Queen v. Edward John Eyre*, supra note 85 at 79–80. His only evidence in the language of the statute was the claim that martial law must ‘ever be considered as amongst the greatest evils’ because of the ‘experience of the mischief and calamities attending it’ (ibid. at 79). Blackburn J.’s rather tendentious exercise in statutory interpretation also contrasts unfavourably with Harrison, *Martial Law*, supra note 11 at 19–23.

122 Blackburn, ibid. at 79.

123 Ibid. at 81.

124 Ibid. at 81–7.

125 Ibid. at xxxviii.

statute. But he was unwilling to specify its legal content, so he effectively left that issue up to the jury, thus silently doing what Cockburn L.C.J. had explicitly done – inviting them to interpret the law for themselves. Moreover, the reasoning of his direction on the law is internally flawed. As we have seen, the parts of Cockburn L.C.J.’s argument come as a package. Doubts about a prerogative power to proclaim an arbitrary regime of martial law should translate into a stance on statutory interpretation averse to finding that those same powers are authorized by statute, in the absence of an altogether explicit legislative statement that they are. If Eyre had, as we saw Blackburn J. said, acted in a clearly excessive way at common law, given that Blackburn J. also thought that there were constraints of reasonableness on Eyre’s actions under statute, he owed the jury an explanation of why those constraints permitted Eyre to be let off the hook of criminal liability.

Still, Finlason should not have endorsed Blackburn J.’s charge, despite his agreement with its message. While that charge was crafted in such a way as to make the jury’s conclusion inevitable, Blackburn J. did go through the motions of setting up a genuine question of fact for the jury to decide.<sup>126</sup> And we have seen that, on Finlason’s view, no institution is capable of second-guessing the governor or other responsible official on questions to do with martial law. In my view, Finlason was motivated both by his evident zeal to retaliate against Cockburn L.C.J.’s harsh words about him and by the temptation already described to temper somewhat his real position that martial law is utterly arbitrary.<sup>127</sup> Since Blackburn J.’s charge had the desired result and was cloaked with respect for legality, Finlason ignored the obvious differences between their positions.

One might still object that these differences, while obvious, were insubstantial. But one can make much the same point about the differences between Finlason and Cockburn L.C.J., or between all three figures. The moral of the story can be interpreted to be that when a society is faced with a radical challenge, law must give way to power, so that the three positions I have set out are just more or less elaborate

126 Cockburn L.C.J.’s charge is, to say the least, bombastic, but, to my ear, Blackburn J.’s charge oozes false sincerity. Note that Blackburn J. claimed to the jury that his charge on the law had been approved in discussions with his fellow judges, including Cockburn L.C.J., though he said he had to take personal responsibility for it (*ibid.* at 87–9). Cockburn L.C.J. angrily repudiated him from the bench six days later, and forced a kind of apology from Blackburn J. See *ibid.* at 104–8.

127 Note in this regard the title of his second book on martial law: W.F. Finlason, *Commentaries on Martial Law with Special Reference to Its Regulation and Restraint* (London: Stevens & Sons, 1867), online: HeinOnline <<http://heinonline.org/HOL/Index?collection=beal&index=beal/cmlw>>.

forms of disguising this fact. Cockburn L.C.J.'s position inevitably collapses through Blackburn J.'s into Finlason's.

However, one can equally claim that the need to take law seriously travels in the other direction, collapsing Finlason's position into Cockburn L.C.J.'s, as long as Finlason remains unwilling to jettison the narrative of legality to describe his position. If one wants a jurisprudence of power because one regards it as essential that politics be conducted within a framework of legality, the 'legal frame,'<sup>128</sup> one is driven to the position that the constitution does not know martial law.

I believe that the only way to decide between these claims is by appeal to practice, a belief that, given the actual outcomes of the Jamaica affair, might seem fatal to the argument I wish to make – that Dicey's position, as first set out by Cockburn L.C.J. and other lawyers at the time of the Jamaica affair, is the only serious candidate to be a *jurisprudence* of power. However, as I will now show by moving via the Boer War to a contemporary US debate, what it means to appeal to practice is itself a complex normative question, because a practice sometimes has to catch up with its normative presuppositions.<sup>129</sup>

v *Constitutional law and constitutional morality*

We had however redeemed, so far as lay in us, the character of our country, by shewing that there was at any rate a body of persons determined to use all means which the law afforded to obtain justice for the injured. We had elicited from the highest criminal law judge in the nation an authoritative declaration that the law was what we maintained it to be; and we had given an emphatic warning to those who might be tempted to similar guilt hereafter, that though they might escape the actual sentence of a criminal tribunal, they were not safe against being put to some trouble and expense in order to avoid it. Colonial Governors and other persons in authority will have a considerable motive to stop short of such extremities in future. (John Stuart Mill)<sup>130</sup>

Mill's optimistic take on the Jamaica affair despite the failure of the prosecutions might seem a little overblown in light of subsequent events. The legal and moral hand-wringing that followed the affair might, when one takes a longer historical view, seem to have disappeared as elites came to terms with the fact that governing an empire is a dirty, brutal business.

128 This is John Fabian Witt's term: Witt, 'Anglo-American Empire,' supra note 28.

129 I would like to acknowledge a more general debt for this thought to my colleague Ernie Weinrib.

130 John Stuart Mill, *Autobiography* (1873), ed. John M. Robson (London: Penguin, 1989) at 219.

While many examples could be adduced, notable in this context is the 1919 massacre in Amritsar, India, where, as elsewhere, some participants in Gandhi's campaign of passive resistance turned to active violence. In Amritsar, martial law was proclaimed and Brigadier-General Rex Dyer ordered his troops to open fire on a crowd of 20 000 that had gathered in contravention of regulations prohibiting meetings of more than four men.<sup>131</sup> The crowd was trapped within the walls of a meeting ground. Around 380 were killed and more than 1 000 wounded. Numerous *in camera* trials followed, at which 180 people were sentenced to death and 264 to transportation for life. The Hunter Committee in England rejected Dyer's justification that the massacre was necessary to intimidate potential disobedients elsewhere, and he was condemned by the House of Commons, though not by the Lords.<sup>132</sup> However, Dyer was never prosecuted, his only 'punishment' that he was invalided out of the army.<sup>133</sup> A.W.B. Simpson says that the Hunter Committee adopted a Diceyan theory, according to which Dyer and others were 'personally liable, and risked trial and indeed conviction for murder'; but, Simpson adds, there 'is no real sense in which this was or could ever be done.'<sup>134</sup>

Moreover, if anything the legal portents for Dicey's theory were hardly good, since in 1902, during the Boer War, the Privy Council, the judicial committee of the House of Lords that was the final court of appeal for the British Empire, decided *Ex parte D.F. Marais*<sup>135</sup> against his theory. In issue was a petition for a special leave to appeal from a decision by the Supreme Court of the Cape Colony. In 1901, while the Boer War was still raging, Marais had been arrested without warrant and removed from the town in which he was arrested to a town some 300 miles away, where he was detained. He petitioned the Supreme Court in Cape Town to release him on the ground that his arrest and his imprisonment were in violation of the fundamental liberties secured to the subjects of His Majesty. However, his jailer stated in an affidavit that Marais was detained by an order of the military authorities for contravening martial law regulations. These regulations permitted military courts to impose the death sentence on those it found guilty of various offences.

The Cape Court had held that martial law had been proclaimed in both the district in which Marais was arrested and the district to which he was removed and that a court could neither go into the question of the necessity of the proclamation nor exercise jurisdiction over the petitioner so long as martial law lasted. Marais contended that he had

131 Simpson, *Human Rights and the End of Empire*, supra note 35 at 64–6.

132 Ibid.

133 See Ferguson, *Empire*, supra note 50 at 276–9.

134 Simpson, *Human Rights and the End of Empire*, supra note 35 at 66.

135 [1902] A.C. 109.

committed no crime, that he had indeed not been arrested and tried according to law, that the civil courts were open for his trial, and that the very judge who refused to release him was to sit in trial of offenders in the district where Marais was arrested. Marais thus claimed that he was entitled to an immediate discharge, since his arrest, deportation, and confinement in custody by the military authorities were wholly illegal.<sup>136</sup>

Marais's lawyers argued that leave to appeal should be given, as the question of law at stake was of 'substantial importance.' The civil courts were still exercising uninterrupted jurisdiction, which went to show that the 'ordinary course of law could be and was being maintained' and thus that a state of war did not exist and martial law could not be applied to civilians. Alternatively, if a state of war existed, the application of martial law did not oust the jurisdiction of the civil courts, which were still administering the law of the land, and no necessity had been alleged to justify bringing the petitioner before a military tribunal while a civil court was still sitting. They relied, among other authorities, on Cockburn L.C.J.'s charge to the jury and on the US Supreme Court's decision in *Ex parte Milligan*.<sup>137</sup>

The Privy Council reduced this argument to the proposition that since some of the courts were open, 'it was impossible to apply the ordinary rule that where actual war is raging the civil courts have no jurisdiction to deal with military action, but where acts of war are in question the military tribunals alone are competent to deal with such questions.'<sup>138</sup> In their view, the petitioner's own petition disclosed that war was raging. It followed that the 'acts done by the military authorities are not justiciable by the ordinary tribunals.'<sup>139</sup> The fact that 'for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging.'<sup>140</sup> Further, 'once let the fact of actual war be established, and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities.'<sup>141</sup> With respect to the Petition of Right, the judges said that its 'framers . . . knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure.'<sup>142</sup> The judges thus seemed to suggest that as long as there was not peace, violations by officials of their constitutional obligations would be legally authorized.

136 Ibid. at 109–10.

137 2 U.S. (4 Wall.) 137 (1866).

138 *Marais*, supra note 135 at 110–2.

139 Ibid. at 114.

140 Ibid.

141 Ibid. at 115.

142 Ibid.



This decision was considered momentous enough for the *Law Quarterly Review*, then as now the leading law journal in the common law world, to publish a four-article symposium on it. In one article, the distinguished legal historian W.S. Holdsworth eschews direct comment on the decision, preferring to deliver a historical treatment of the topic of martial law, but one that clearly leans in favour of endorsing Cockburn L.C.J.'s views.<sup>143</sup> In another, Cyril Dodd strongly criticizes the decision, in particular because it could be interpreted as suggesting that the proclamation of martial law authorizes the military to act as they see fit with impunity and because the Petition of Right was itself passed during a time of unrest and was intended to make clear that in such times the Crown is constitutionally prohibited from claiming the power to 'deal with subjects at any time by other means than by the ordinary courts.'<sup>144</sup> In contrast, H. Erle Richards supported the decision on grounds very similar to those articulated by Finlason.<sup>145</sup> No less a figure than Frederick Pollock argued for a rather more moderate version of that same position.<sup>146</sup> Pollock in particular wished to stress that, given the nature of modern warfare, old understandings of constitutionally appropriate measures might not be adequate.<sup>147</sup> Dicey joined in this debate by adding an appendix on martial law to his *Introduction to the Study of the Law of the Constitution*.<sup>148</sup> There he expresses doubt about the holding in *Marais* and clearly aligns himself with Cockburn, Holdsworth, and Dodd and thus against Pollock and Erle Richards.<sup>149</sup>

One clear point of difference between Holdsworth, Dodd, and Dicey, on the one hand, and Erle Richards and Pollock, on the other, is that the first three are as concerned with the idea that military tribunals will preside over the detention and trial of civilians as they are with all the other things that might be done in the name of martial law. Indeed, they may be even more concerned with this issue than any other. In contrast, Erle Richards and Pollock do not seem to see any need to distinguish between what tribunals do and what officials do. For them, the issue of martial law is about the full gamut of things that are likely to be done in its name. Since martial law permits the executive to act as it deems appropriate, it does not matter whether it is acting by meting

143 W.S. Holdsworth, 'Martial Law Historically Considered' (1902) 18 L.Q.Rev. 117.

144 Cyril Dodd, 'The Case of *Marais*' (1902) 18 L.Q.Rev. 143 at 148–9.

145 H. Erle Richards, 'Martial Law' (1902) 18 L.Q.Rev. 133.

146 Frederick Pollock, 'What Is Martial Law?' (1902) 18 L.Q.Rev. 152. See his summary of his points of agreement and disagreement with Erle Richards at 158.

147 *Ibid.* at 56. See further Richard A. Cosgrove, 'The Boer War and the Modernization of British Martial Law' (1980) 44 Mil.Aff. 124.

148 Dicey, *Law of the Constitution*, supra note 11, Note X, 'Martial Law in England During Time of War or Insurrection.'

149 *Ibid.* at 538 n. 1, 544–7, 550–1, 551–5.

out immediate violence or by mediating that violence with some form of hearing or trial by military tribunal.

One might well wonder about an obsessive concern with passing control over trials to the military.<sup>150</sup> After all, as the events at Morant Bay underline, a lot of what happens under the rubric of martial law is the immediate violence of death, flogging, and large-scale destruction of property, next to which the trials of a few prominent leaders or alleged leaders of an uprising might look rather insignificant. If sheer human suffering is the measure, then of course the immediate violence is more significant than a few trials. But while the officials who perpetrate such violence claim that, in dealing as they see fit with an uprising, they have the authority of law, they do not thereby challenge what Dicey considered, as we have already seen, to be one of the two main features of the ‘political institutions of England’ – the ‘rule or supremacy of law.’<sup>151</sup>

Dicey took the rule of law to include three ‘distinct though kindred conceptions.’<sup>152</sup> First, the rule of law means that

no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.<sup>153</sup>

Second, the rule of law means not only that ‘no man is above the law’ but also ‘a different thing’: that ‘every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.’ This Dicey terms the ‘idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts.’<sup>154</sup>

The third meaning is rather more ephemeral, the rule of law understood as ‘the predominance of the legal spirit [that] may be described as a special attribute of English legal institutions’:

We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of a public meeting) are with us the result of judicial decisions

150 Simpson points out that Fitzjames Stephen and James, in their joint opinion for the Jamaica Committee, took the position that trial and punishment might be permissible by the military, and thus may be said to have held a view incompatible with Dicey’s theory. Simpson, *Human Rights and the End of Empire*, supra note 35 at 63 n. 15.

151 Dicey, *Law of the Constitution*, supra note 11 at 179.

152 Ibid. at 183.

153 Ibid. at 183–4.

154 Ibid. at 189.

determining the rights of private persons in particular cases brought before the Courts; . . . whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.<sup>155</sup>

This understanding of English constitutionalism, however arrogantly parochial it may seem, serves to bring out the nature of the common law constitution's antipathy to martial law. The immediate acts of violence will, according to the common law understanding of constitutionalism, be either justified or not by the defence of necessity, a matter on which the ordinary courts will decide. That is, while public officials may claim the authority of law, whether they had it or not comes neither from that claim nor from any proclamation of martial law but from the quality of their acts. Thus their claim poses no challenge at all to the rule of law.

However, if military tribunals are set up both to determine detentions of civilians and to try them, the challenge is to the rule of law. It is important to recall that the Petition of Right, as well as the various *habeas corpus* statutes that followed it, were events in a political struggle over legal order waged not primarily between the courts and the executive but between Parliament and the executive.<sup>156</sup> Moreover, the main focus of that struggle was not on the acts of the military in times of stress, in responding to particular threats or in authorizing military actions such as forcible billeting of soldiers, but on the claim of the military to be able to set up a system of courts parallel to the civil courts.<sup>157</sup>

The immediate consequence of Parliament's victory was the other main feature of English political institutions identified by Dicey, the 'undisputed supremacy throughout the whole country of the central government,' an authority that had once belonged to the King as 'the source of law' but had passed into the 'supremacy of Parliament.'<sup>158</sup> As we have seen, this feature can be and has been seen as threatening the rule of law, since Parliament's supremacy makes possible parliamentary abolition of the rule of law. However, in order for this possibility to arise, the rule of law has itself to be brought into existence. That requires the establishment of the supremacy of law over the executive, which involves establishing a centralized body for adjudication of disputes about law's limits, a body that is independent of the officials who claim to act in the name of the law. In other words, Dicey's genius – and the solution to the puzzle of martial law – lies in the insight that parliamentary supremacy also makes the rule of law possible, since it provides the basis for

155 Ibid. at 191 [citation omitted].

156 See Edward Jenks, 'The Story of the *Habeas Corpus*' (1902) 18 L.Q.Rev 64, and Lindsay Boynton, 'Martial Law and the Petition of Right' (1964) 79 Historical Review 255.

157 See particularly Holdsworth, 'Martial Law Historically Considered,' supra note 143.

158 Dicey, *Law of the Constitution*, supra note 11 at 179.

accountability of the executive to law. Dicey is not, then, an apologist for either Parliament or judges. Rather, his insight is that both institutions are required to work in a cooperative relationship if executive accountability to law is to be secured. That insight is no less illuminating in our own context.

Consider, for example, Trevor Morrison's recent argument that when the US Congress, relying on the 'Suspension Clause' of the US Constitution,<sup>159</sup> suspends the writ of *habeas corpus*, unlawful detentions are not thereby converted into lawful ones.<sup>160</sup> His argument is specifically aimed at the model articulated by Justice Scalia in his dissent in *Hamdi v. Rumsfeld*,<sup>161</sup> a model Morrison calls 'suspension-as-legalization.' On this model, suspension not only provides an 'affirmative grant of authority to detain, but also displaces any constitutional or other legal objection ... that might be raised against the detention.'<sup>162</sup> Suspension thus creates a 'lawless void, a legal black hole, in which the state acts unconstrained by law.'<sup>163</sup> This model, as Morrison has pointed out, has attracted the support of prominent academics, including David Shapiro, who argues that the 'practical reality' of emergencies requires that the executive be freed 'from the legal restraints on detention that would otherwise apply.'<sup>164</sup> For Shapiro, suspension amounts to legalization, because otherwise executive actors might be 'deterred from engaging in the very activity needed, and contemplated, to deal with the crisis by an ... understandable reluctance to violate their oaths to support the Constitution.'<sup>165</sup> Morrison, in contrast, argues that executive actors must always seek to uphold the Constitution.

In the course of this argument, Morrison reviews the history both of suspension acts in England and of the indemnity acts that often followed them. He concurs with Dicey in concluding that suspension did not

159 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' U.S. Const. art. I, §9, cl. 2.

160 Trevor W. Morrison, 'Suspension and the Extrajudicial Constitution' (2007) 107 *Colum.L.Rev.* 1533.

161 542 U.S. 507, 124 S. Ct. 2633 (2004).

162 Morrison, 'Suspension and the Extrajudicial Constitution,' supra note 160 at 1539.

163 Ibid. at 1539, quoting David Dyzenhaus, 'Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?' (2006) 27 *Cardozo L.Rev.* 2005 at 2006.

164 David L. Shapiro, 'Habeas Corpus, Suspension, and Detention: Another View' (2006) 82 *Notre Dame L.Rev.* 59 at 86, 89 [Shapiro, 'Habeas Corpus, Suspension']. As Morrison points out, Shapiro does not contemplate a total black hole: at 90–5, he confines his argument to the issue of detention, thus removing from its scope issues such as treatment during detention. Morrison, 'Suspension and the Extrajudicial Constitution,' supra note 160 at 1540. On my argument, Shapiro's qualification merely demonstrates the grip of the compulsion of legality.

165 Shapiro, 'Habeas Corpus, Suspension,' supra note 164 at 89.

‘affect the availability of any post detention remedy for illegal detention’<sup>166</sup> and that the scope of indemnity acts supports this claim in that they confer immunity on officials for illegal acts carried out during an emergency, something that would not be necessary if suspension created a legal black hole.<sup>167</sup> On his account, the historical evidence of the practice of suspension and immunity through indemnity in the United States supports the same conclusions.<sup>168</sup>

Morrison does note some wrinkles in his historical account,<sup>169</sup> and that Dicey himself was at times ambivalent, particularly when he vacillated between a claim that indemnity acts do not affect underlying questions of legality and a claim that they do because they legalize past illegality.<sup>170</sup> Morrison perceptively diagnoses the source of Dicey’s ambivalence as residing in Dicey’s conception of law, in which ‘constitutional law’ is the law that courts can enforce, since law properly so called is those rules and norms that ‘are enforced by the courts.’<sup>171</sup> As Morrison notes, this understanding of law requires Dicey to distinguish between ‘constitutional law’ and ‘constitutional morality,’<sup>172</sup> and the distinction results in the view that because ‘an indemnity act removes all judicial remedies for unlawful detention, the detention itself is no longer contrary to law.’<sup>173</sup> For the ‘modern U.S. reader,’ Morrison goes on, Dicey’s view will appear odd, because the distinction between a right and a judicial remedy is now a ‘commonplace’; the reader, unlike Dicey, will know that there is such a thing as ‘extrajudicial constitutionalism’ – principles of constitutional law that are appropriately enforced not by judges but by the legislature and the executive.<sup>174</sup>

I will not describe Morrison’s complex argument on this issue in any detail. Suffice it to say that he contemplates circumstances in which it is appropriate for the legislature to design a system of executive detention whereby the detainees are given due process but the norms of due process are enforced by non-judicial actors. Judges will still have a role,

166 Ibid. at 1546–51, 1547.

167 Ibid. at 1551.

168 Ibid. at 1552–74.

169 Ibid. at 1575–9. As I will argue in Part VI below, it is hardly surprising that there are wrinkles, given that accounts of the history on this kind of controversial issue are inescapably saturated with normative judgements.

170 Ibid. at 1577, referring to Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959; reprint, London: Macmillan, 1987) at 233 (at 228–9 in the 8th edition, *supra* note 11).

171 Morrison, ‘Suspension and the Extrajudicial Constitution,’ *supra* note 160 at 1578, referring to and quoting from Dicey, *ibid.* at 23–4 (at 23 in the 8th edition, *supra* note 11).

172 Dicey, *ibid.*

173 Morrison, ‘Suspension and the Extrajudicial Constitution,’ *supra* note 160 at 1578.

174 Ibid.

because the question of whether the detainees' rights to due process are adequately safeguarded by the process accorded to them is ultimately a question on which judges must decide and, moreover, the kind of question on which they should not too easily defer either to the executive or to the legislature.<sup>175</sup>

In taking this position, Morrison aligns himself by implication with Cockburn L.C.J. and the grand jury that decided the matter of *Nelson and Brand*, as well as explicitly with Dicey, in calling for a legislative answer to the challenge posed by martial law. The call, of course, is not for a blanket authorization to the executive to do whatever it sees fit, as the George W. Bush administration has interpreted the post-9/11 congressional resolution, but for a carefully designed system of preventive measures in which due process is accorded those subject to the measures, with judicial review playing a role at least in ensuring adequate due process.

I myself am doubtful, and Morrison perhaps shares these doubts, whether due process can be ensured without judges' playing a role in determining both whether the actual decisions taken by the executive are reasonable and that the very decision by the legislature to embark on this course is reasonable.<sup>176</sup> In my view, the five components – legislative authorization, adequate due process, judicial review of adequacy, judicial review of decisions taken in the process, judicial review of the necessity to resort to such a process – come as a package.

My argument is that only if all five components are in place can the executive claim to be acting constitutionally, where by 'constitutionally' I mean not primarily in accordance with the written constitution, if there is one, but with the constitutional fundamental of any legal order – the principle of legality which requires that the executive be able to show a legal warrant for all its acts. Only if that requirement is observed can the legal order in which the executive is operating sincerely claim to be such: an order of legality.

However, since if all five components are in place it follows that the executive is acting constitutionally when it detains or adopts other preventive measures, it also follows that there is no need to activate the suspension clause.<sup>177</sup> It is this kind of concern that, in part, motivates the suspension-as-legalization model. It might seem, that is, that if one is to make sense of the suspension clause – of its very existence in the Constitution – it has to make a difference, the difference being that it

175 Ibid. at 1579–614, especially at 1590–95.

176 As I understand Morrison's argument, it is not that judges should be excluded from this review role but, rather, about what are the executive's constitutional responsibilities *if* one assumes that judges should be excluded.

177 Unless, of course, the written constitution contains more stringent requirements.

legalizes in advance what would otherwise be illegal. Morrison resists this suggestion, since he wishes to argue for suspension as immunity as opposed to suspension as legalization, not only because he takes suspension as immunity to be truer to history but also, and perhaps mainly, because suspension as immunity upholds the principle of legality.

However, there is another way of understanding the suspension provision, which follows Morrison in taking its cues from the English *habeas corpus* suspension acts, but with a rather different gloss. Those acts were what we can think of as primitive derogations from the constitutional morality of the legal order, a claim that requires some unpacking. They were *derogations* because they did not purport to change constitutional morality but only to provide a temporary immunity from its normal operation. (Indeed, as Dicey points out, all they sought to achieve was a temporary immunity from *habeas corpus* for people detained on a charge or on suspicion of high treason.<sup>178</sup>) They were derogations from *constitutional morality*, not constitutional rules, because, following Ronald Dworkin's distinction between principles and rules, the choice of derogation is evidence of the fact that the legal norm derogated from is recognized as a fundamental principle that cannot be overridden except at the cost of constitutional revolution. And they were *primitive* in at least two important respects, both formally, by comparison with the derogation process set out in the European Convention on Human Rights (ECHR), and informally, because the institutional imagination of the time did not include the sophisticated apparatus of the administrative state of the late twentieth century.

Article 15 of the ECHR states that

- (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3,<sup>179</sup> 4 (paragraph 1)<sup>180</sup> and 7<sup>181</sup> shall be made under this provision.
- (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons

178 Dicey, *Law of the Constitution*, supra note 11 at 224–6. See R.J. Sharpe, *The Law of Habeas Corpus*, 2d ed. (Oxford: Clarendon Press, 1989) at 94–5.

179 Torture.

180 Slavery/servitude.

181 Convictions of only those criminal offences in existence at time of act.

therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.<sup>182</sup>

Derogation thus differs formally from suspension because it entrenches both a monitoring mechanism that goes beyond Parliament to international bodies<sup>183</sup> and rights from which there can be no derogation. It puts in place a test of strict necessity which presupposes that the derogation itself as well as the derogating measures are subject to review and, moreover, subject to a rather exacting standard. It requires that rights be explicitly derogated from, which means that all rights not explicitly derogated from are in force, as well as all non-derogable rights, together with the government's other international obligations. In addition, it leaves intact the principle of legality. As Tom Hickman has put it, the 'derogation model creates a space between fundamental rights and the rule of law. Whilst governments are permitted to step outside the human rights regime their action remains within the law and subject to judicial supervision.'<sup>184</sup>

Informally, derogation takes place in a context in which the administrative state has developed both sophisticated adjudicative mechanisms and ways of meshing these with judicial review to ensure compliance with constitutional fundamentals. And in the United Kingdom, under the direct influence of the ECHR, specific mechanisms have developed for testing information relied on by the executive in making decisions on grounds of national security. As a result, when the United Kingdom derogated from the ECHR in the wake of 9/11, it already had in place a legislatively created adjudicative body for review of decisions on grounds of national security, the Special Immigration Appeals Commission (SIAC), developed in order to achieve compliance with its human-rights obligations.

It is eminently worth noting that these developments were themselves largely spurred by the same wartime Defence of the Realm Acts that could be interpreted as legislative delegations to the executive of exactly the kind of power that it had in the past claimed under the prerogative to declare martial law.<sup>185</sup> That is, the experience of highly centralized

182 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 [ECHR].

183 For the ambiguous role of such bodies in monitoring emergencies, see Oren Gross & Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006) at 304–25.

184 Tom R. Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68 Mod.L.Rev. 655 at 659.

185 I tell the story that follows in more detail in chapter 3 of David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University



government under delegated powers during the world wars laid the basis for the twentieth-century administrative state. Dicey no more regarded the administrative state as having a place in the English constitution than he did that other French abomination, the state of siege: the emergency provision of the French Constitution that, as he described it, had the effect that the ‘authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army (*autorité militaire*).’<sup>186</sup> Neither was, in his view, controllable by the rule of law.

However, as I have just mentioned, the twentieth century saw the development not only of such a state but of one governed effectively by the rule of law, both through mechanisms internal to that state and through mechanisms that meshed those internal mechanisms with judicial review. The one exception was national security and other powers considered to be exercised by prerogative. But both the prerogative and national security are now recognized to be amenable to the controls of the rule of law, including judicial review. At present, the United Kingdom and other Commonwealth jurisdictions are involved in an elaborate experiment, one that involves all three branches of government, the point of which is to design appropriate and adequate rule-of-law controls on executive decisions made on grounds of national security.<sup>187</sup>

That experiment began at the moment Parliament began the practice of giving advance authorization to the executive to deal with threats to national security. One can view these statutes, at least in the early stages of the process, as authorizing the executive to do what it would previously have claimed a prerogative power to do, and so, as indicated earlier, as putting an end to martial law in name but not in substance. As we have also seen, under a common law constitution one can also view this step as removing from judges their only remedy – the invalidation of executive acts that are not authorized by legislation.

However, these views neglect the fact that legislative authorization begins, or at least potentially begins, a process of judicial scrutiny that has a logic whose scope transcends the remedy of invalidation. The political decision to authorize through legislation responds to what I have

Press, 2006) [Dyzenhaus, *Constitution of Law*]. See further Hickman’s illuminating account of Dicey’s constitutional theory in Tom R. Hickman, ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998’ [2005] *Pub.L.* 306 at 322–6.

186 Dicey, *Law of the Constitution*, supra note 11 at 283–4 [citations omitted]. For a discussion of the state of siege see William Feldman, ‘Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege’ (2005) 38 *Cornell Int’l L.J.* 1021.

187 See Clive Walker, ‘Keeping Control of Terrorists Without Losing Control of Constitutionalism’ (2007) 59 *Stan.L.Rev.* 1395; David Dyzenhaus, ‘Cycles of Legality in Emergency Times’ (2007) 18 *Pub.L.Rev.* 165 [Dyzenhaus, ‘Cycles of Legality’].

called elsewhere the ‘compulsion of legality’ – the compulsion to justify all acts of state as having a legal warrant, the authority of law.<sup>188</sup> In the United Kingdom during World War I and World War II, the indefinite detention of individuals perceived to be risks to national security had to follow a procedure set out in regulations. Each decision was, in principle, subject to an appeal to an executive committee, whose chairman had to inform detainees of the grounds of their detention so that they could make a case to the committee for their release. The home secretary could decline to follow the advice of the committee, but he had to report monthly to Parliament about the orders he had made and about whether he had declined to follow advice. The committee, however, lacked rule-of-law teeth.<sup>189</sup> Not only did it fail to require the real reasons for detentions from the intelligence branch, but in any case, if it thought that someone had been wrongly detained, it could only advise the home secretary of its view.

When judges are required to pronounce on the legality of such a regime, they have three options. First, they can try to give the regime rule-of-law teeth. Second, they can say that the regime is legal without making the attempt, in which case they give the regime the imprimatur of the rule of law by equating that rule with rule by law. Finally, they might find that the regime is illegal because it is incompatible with fundamental principles of legality.

The majority of the House of Lords in the World War I decision *Halliday*<sup>190</sup> and the World War II decision *Liversidge*<sup>191</sup> on the legality of the detention regime adopted the second option. They said that the demands of legality were satisfied by the detention regime and that such regimes were appropriate given the context – wartime emergency. In contrast, Lord Shaw in his dissent in *Halliday* chose the option of invalidation. He started with the assumption that Parliament must be taken to intend that its delegates act in accordance with the rule of law, which meant that it had explicitly to authorize any departures from the rule

188 David Dyzenhaus, ‘The State of Exception,’ in Michel Troper, ed., *Traité international de droit constitutionnel* (Paris: Presses Universitaires de France, forthcoming). For further exploration of this idea see Dyzenhaus, ‘Cycles of Legality,’ supra note 187.

189 A.W.B. Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford: Oxford University Press, 1992) [Simpson, *In the Highest Degree Odious*]. Simpson, especially at c. 3, points out that the government effectively pulled the wool over the judges’ eyes. While the statutory scheme required the secretary of state to have reasonable grounds and to communicate those grounds to the chairman of the advisory committee, not only were the grounds not communicated to the appealing detainee but the chairman was also not given the reasons. To find out the true grounds, the committee would have had to subpoena the public officials and question them in court.

190 Supra note 37.

191 *Liversidge v. Anderson*, [1942] A.C. 206.

of law. As Lord Shaw put it, the judicial stance should be that ‘if Parliament had intended to make this colossal delegation of power it would have done so plainly and courageously and not under cover of words about regulations for safety and defence.’<sup>192</sup> For judges to allow the right to be abridged is to revolutionize the constitution, perhaps, more accurately, to undertake a counter-revolution. It amounts to what Lord Shaw called a ‘constructive repeal of habeas corpus,’<sup>193</sup> a repeal by the executive that is then ratified by judges. He would, he said, have come to this conclusion even had the language of the statute ‘been much more plain and definite than it is.’<sup>194</sup> Since the Defence of the Realm Consolidation Act 1914 did not explicitly authorize a detention regulation, the regulation that brought the detention regime into play was invalid.

When civil servants put together the detention regime used during World War II, they took note of Shaw’s dissent and so ensured that the authorizing statute explicitly permitted the establishment of a detention regime by regulation. Again, one can view this step either as progress toward the realization of the rule of law or as yet another embellishment to a facade. But, in addition to this response to a dissenting judge, the government responded to concerns raised in Parliament about the wording of the initial version of the detention regulation by substituting ‘reasonable cause to believe’ when it came to the grounds for detention for the original proposal of ‘if satisfied that.’

It was on the basis of that substitution that Lord Atkin held in his famous dissent in *Liversidge* that a court was entitled to more than the government’s say-so that an individual is a security risk, thus seeking, in line with the third option, to make the scheme into something better. The majority disagreed on the basis that it was inappropriate in wartime for judges to go beyond the mechanism explicitly put in place, the toothless review committee. Lord Atkin thus accused his fellow judges of being more executive-minded than the executive and of acceding to arguments that had not been put to a court since the days of the Star Chamber.<sup>195</sup>

In my view, *Liversidge* is best understood as but one episode in the story of what we can think of as the rule-of-law project – the project in which the writ of the rule of law progressively extends. First, Lord Shaw’s

192 *Halliday*, supra note 37 at 292–3.

193 *Ibid.* at 294.

194 *Ibid.* at 293.

195 *Liversidge*, supra note 191 at 244. Simpson does not have a high regard for Lord Atkin’s dissent in *Liversidge*, which he regards as evidence for the claim that what judges care most about is their formal place in legal order; Simpson, *In the Highest Degree Odious*, supra note 189 at 363. However, that claim is of a piece with his general rejection of Dicey’s theory of martial law and fails to take into account the point I make above about how the supremacy of law makes the rule of law possible.

insistence in *Halliday* on what we would call today a ‘clear statement rule,’ the rule that the legislature must expressly delegate the authority to infringe fundamental rights, did have the result that the authorization to detain was put into the Defence of the Realm Act in World War II and was thus subject to parliamentary debate. That subjection meant that both the question of the content of the regulation and the question of whether there should be such a regulation came up for debate in Parliament, instead of being regarded as matters of executive prerogative. And, as we have seen, debate on the former question led to the substitution in wording.

Second, while Lord Atkin put rather too much emphasis on the substitution, he was entitled to infer from it, and indeed from the very existence of the toothless executive committee, that the legislature and the executive did think that some review of detention decisions was not only possible but also desirable. Indeed, it is worth noting that in the leading speech for the majority in *Liversidge*, Viscount Maugham said that if an appeal against the home secretary’s decision ‘had been thought proper, it would have been to a special tribunal with power to inquire privately into all the reasons for the Secretary’s action, but without any obligation to communicate them to the person detained.’<sup>196</sup> He too, therefore, thought that review is possible, though not in the absence of institutional innovation. And, to cut a longer story short, precisely such an innovation was attempted when Parliament responded to an adverse decision of the European Court of Human Rights<sup>197</sup> by creating the SIAC, a tribunal with full authority to review executive decisions made on national security grounds that has access to all the information on which the executive bases its claims and to the service of a special advocate to test the executive’s case.

The derogation model thus travels with another model, the legislative model, since it presupposes that strict necessity can be observed only if the rights displaced are replaced by a suitably proportionate, legislatively designed regime of legality. If that regime is not proportionate, or if it is in conflict with rights not derogated from, or if it conflicts with non-derogable rights, then the derogation itself will be invalid. This is well illustrated by the *Belmarsh*<sup>198</sup> decision of the House of Lords.

The Anti-terrorism, Crime and Security Act of 2001, the United Kingdom’s reaction to 9/11, put in place a system of detention for aliens who were suspected of being security risks but who could not be deported because of the risk of torture. The statute was accompanied by a derogation notice under art. 15 of the ECHR, in which the

196 *Liversidge*, supra note 191 at 220–2.

197 *Chahal v. United Kingdom* (1996), 23 E.H.R.R. 22.

198 *A. v. Secretary of State for the Home Department*, [2005] A.C. 68 (H.L.).

government notified its intention to derogate from the art. 5 protection of liberty. In *Belmarsh*, the majority of the House of Lords found the derogation invalid and the system incompatible with the Human Rights Act (1998),<sup>199</sup> both because the system was disproportionate and because it violated a right to equality (art. 14) that had not been derogated from.

In response, the government introduced by legislation – the Prevention of Terrorism Act 2005 – a system of control orders that applies to both citizens and aliens. In this system there are two types of control order. There are derogating control orders, which impose obligations incompatible with the controllee's right to liberty under art. 5 of the European Convention and which are made by a court. And there are non-derogating control orders, made by the secretary of state and subject to judicial review. The system thus set out two different tracks: the derogation model plus the legislative model and the legislative model, which was expected to be the norm and also assumed to be constitutional, by which I mean in compliance with the Human Rights Act (1998).

One can, in my view, take the following lesson from this story. The insistence on a clear statement rule makes sense only if it is followed by meaningful review of the executive decisions once properly authorized. Moreover, such insistence also makes such review possible, because it forces the executive to bring its activity within the scope of a deliberately and democratically designed statutory regime, one that has at least the potential of providing rule-of-law teeth. At least, one can take that lesson if the insistence does not inevitably result in a mere thin veneer of procedural legality, to which judges give their blessing.

Dicey, as I have pointed out, was unable to imagine this kind of solution to the tension he perceived to be created by *habeas corpus* suspension acts for his argument about the constitutional status of the rule of law precisely because of his antipathy to the administrative state. While he yearned for a legislative solution to the problems posed by states of emergency that would impose the rule of law on the executive, all he could envisage was the common law of necessity, with perhaps the addition of a *habeas corpus* suspension act, and then an act of indemnity. He thus could not contemplate a constitutional or legislative solution that, instead of suspending *habeas corpus*, sought to preserve it through a system of tribunals that would operate differently from the ordinary civil process developed by the courts. And even though he thought both that indemnity acts should be confined to providing immunity for acts that, though unlawful, were done in good faith and neither reckless nor cruel and that officials would be answerable before the courts for any

199 The Human Rights Act does not give judges the authority to invalidate a statute. All they may do is make a declaration of incompatibility.

illegal acts not covered by the indemnity, he still had to acknowledge that this combination could not cover the entire field.<sup>200</sup> Not only would there be a time when officials acted illegally, and thus arbitrarily, but the indemnity act could itself rightly be viewed as a supreme act of arbitrariness.<sup>201</sup> Indeed, he also had to acknowledge that an indemnity act could cover far more than he thought appropriate. For example, as we have seen, the indemnity act Eyre procured in Jamaica covered literally everything he and his officials had done.<sup>202</sup>

200 He also had to contemplate a statute that suspended *habeas corpus* and at the same time provided advance immunity for officials who acted unlawfully. See, e.g., his discussion of the Act of 1881, 44 Vict., c. 4, for Ireland, supra note 11 at 226–7; and see Morrison, ‘Suspension and the Extrajudicial Constitution,’ supra note 160 at 128–34, discussing an 1863 US statute.

201 ‘An Act of Indemnity . . . though it is the legalisation of illegality, is also . . . itself a law. It is something in its essential character, therefore, very different from the proclamation of martial law, the establishment of a state of siege, or any other proceeding by which the executive government at its own will suspends the law of the land. It is no doubt an exercise of arbitrary sovereign power; but where the legal sovereign is a Parliamentary assembly, even acts of state assume the form of regular legislation, and this fact of itself maintains in no small degree the real no less than the apparent supremacy of law.’ Dicey, *Law of the Constitution*, supra note 11 at 233. For the text of an act of indemnity of which Dicey approved, *ibid.* at 231–2, see the Appendix to this article.

202 ‘The Suspension Act, coupled with the prospect of an Indemnity Act, does in truth arm the executive with arbitrary powers. Still, there are one or two considerations which limit the practical importance that can fairly be given to an expected Act of Indemnity. The relief to be obtained from it is prospective and uncertain.’ *Ibid.* at 231–2. Moreover, the public may be unwilling to allow Parliament to indemnify officials who have ‘grossly abused their powers,’ and the protection given will depend on the terms of the act. Here Dicey contrasts the ‘moderate character’ of an ordinary act of indemnity with the act of the Jamaica House of Assembly, which ‘attempted to cover General Eyre from all liability for unlawful deeds done in suppressing rebellion.’ *Ibid.* at 232–3.

Eyre’s indemnity statute produced much anxiety in the executive administration in England as politicians and civil servants debated whether it should be disallowed by order in council, a possibility for all statutes enacted at the time by North American or West Indian legislatures. See B.A. Knox, ‘The British Government and the Governor Eyre Controversy, 1865–1875’ (1976) 19 *Historical Review* 877 at 884–90. Ultimately, the act was not disallowed. Unsurprisingly, Finlason thought the act superfluous. On his view, no bill of indemnity can be required, since no one who acts under martial law can ‘possibly be liable, civilly or criminally, or require such a protection . . .; and that, so far as regards measures so taken, it is not material to their legality that they turn out in the event to have been excessive; and that whether or not they may be censurable or even culpable on that account, persons cannot be *criminal* for directing or carrying them out honestly, however erroneously, in obedience to orders, and under martial law.’ Finlason, *Treatise on Martial Law*, supra note 64 at xvi [original emphasis].

Further, the thought that there might be need for such acts is ‘perilous to the defence of our distant colonies and dependencies, in cases of rebellion, if it were understood that Governors and Generals who declared, and acted on, martial law,

If the suspension clause entrenches, as Morrison argues it does, more or less Dicey's understanding of suspension, it also entrenches that same lack of imagination. That in itself is not a problem, as, on my argument, at best the mechanism of suspension is a primitive form of derogation, so that an institutionally mature legal order should simply bypass suspension and put in place a system of derogation. In such a system, the space that is opened up by a derogation from constitutional morality is different from the space of, say, ordinary criminal law, where detention is legitimate only pending a trial. But the space is still highly structured by principles of legality. Moreover, the derogation model does not simply presuppose accompaniment by the legislative model: far preferable is a legislative model that does not require derogation because all the components are in place that make it fully constitutional.

It is even plausible to construe the events since 9/11 in the United States as following this kind of path. On one view, for example, that taken by Justice Scalia in *Hamdi*, if the executive wishes to detain people on national security grounds, it must ask Congress to suspend *habeas corpus*, in which case the executive can do what it likes except insofar as Congress explicitly limits the scope of its powers. The detainees are then in a legal black hole, though, as Morrison points out, the proponents of this model of suspension still regard what the officials do as legally authorized. By contrast, the majority in *Hamdi* took something like the path I have sketched, in that they regarded the system of detention as legislatively authorized by the Congressional Resolution passed immediately after 9/11 and as constitutionally appropriate as long as detainees were given adequate due process, a question on which the courts would make the ultimate decision.

I say 'something like' because the Congressional Resolution did not explicitly authorize detention and because the test the Supreme Court appeared to signal was appropriate for determining adequate due process is cost-benefit analysis – a far cry from a proportionality analysis, in which the question is what is appropriate given the weightiness of the interest in liberty. For the Court to follow exactly this path, it should have found in the first instance, as it would later do in *Hamdan* in respect of criminal trials by military tribunals, that detention cannot be authorized by implication. It should also have left open the question of what sort of authorized scheme would also meet the test of constitutionality, rather

were to be deemed guilty of wholesale murder, and entirely dependent on the indulgence of a bill of indemnity.' *Ibid.* at xviii.

Somewhat surprisingly, Blackburn J. suggested to the jury that it was doubtful that an act of indemnity could provide immunity against a true bill found in England. Blackburn, *Case of The Queen v. Edward John Eyre*, *supra* note 85 at 101.

than, as it did, signalling to the executive that very bare due process would suffice.

Despite these concerns, *Hamdi* and *Hamdan*, with other decisions, can be regarded as having hauled the executive within the space of legality.<sup>203</sup> More accurately, since the executive, even at its most extravagant, always claimed to be acting in a constitutionally and legally authorized fashion, either because of its inherent powers or its powers delegated by Congress, one might say that the Court forced the executive to live up to its professed commitment to legality. At the same time, at least since *Hamdan*, it has forced Congress to deliberate on and respond through legislation to what the executive had claimed as its preserve. As Witt comments in his review of Kostal and other works on law and empire, these decisions of the US Supreme Court can be seen as having brought about a 'rough restoration of British constitutionalism's discursive boundaries.' Yet, as he also says, each new round 'threatens to undo the Court's embattled compromise.'<sup>204</sup> Here he refers to the legislative response to *Hamdan*, one that roughly gave the executive what it had wanted in the first place by putting in place by legislation the system of military tribunals the executive had sought to create by executive order. If the Court finds this legislative scheme constitutionally appropriate, the executive will have what I have elsewhere called a 'grey hole,' a space that contrasts with 'black holes' in that those in the space are given some legal protections but the protections are not sufficient to permit them to contest the basis of the preventive measures taken against them.<sup>205</sup> Indeed, Witt follows Kostal, Finlason, and, presumably, Carlyle in finding Cockburn L.C.J.'s charge wanting. He even quotes approvingly Finlason's claim that the charge was 'utterly indeterminate and indecisive; it laid nothing down clearly,'<sup>206</sup> and he finds absurd that the grand jury asked 'plaintively' that martial law should be more clearly defined by legislative enactment.<sup>207</sup>

203 Notably, and most recently at the time of final revisions to this article, *Boumediene v. Bush*, 553 U.S. \_\_\_\_ (2008), 128 S. Ct. 2229 (2008), which found that constitutional *habeas corpus* protection extends to non-citizens detained at Guantanamo Bay and that the procedures accorded to these detainees for contesting their detentions are an inadequate substitute for *habeas corpus*.

204 Witt, 'Anglo-American Empire,' supra note 28 at 796. Witt also reviews Hulsebosch, *Constituting Empire*, supra note 25; Ferguson, *Empire*, supra note 50; and John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: University of Chicago Press, 2005).

205 Dyzenhaus, *Constitution of Law*, supra note 185 at c. 1.

206 Witt, 'Anglo-American Empire,' supra note 28 at 794, quoting Finlason, *Commentaries on Martial Law*, supra note 127 at 23.

207 Witt, *ibid.* at 794.



In other words, one gets precisely the problem identified at various points in this article – a determined executive with control over the legislature seems able to flout constitutional morality by giving itself the power to do through authorizing legislation what the courts might deny it in the absence of such legislation. Moreover, in the US context one observes that the presence of an entrenched bill of rights seems to be of no more avail than is a judge-made constitution.

Dicey's claim that the judge-made constitution is superior to bills of rights thus looks shaky. Recall that he said of the former that in it the right to individual freedom is 'part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation,' while in the latter the general rights it guarantees are 'something extraneous to and independent of the ordinary course of law,' hence subject to suspension.<sup>208</sup> That claim should, it seems, be watered down to a claim that both kinds of constitution are equally susceptible to executive override.

Nevertheless, there is something to Dicey's thought about constitutional superiority, for at least two reasons. First, in the case of a judge-made constitution, where it is clear that Parliament enjoys so-called legislative supremacy, there is less scope for what we can think of as constitutional *complacency* and *inertia*: complacency, because of the temptation to suppose that the presence of an entrenched bill of rights means that fundamental rights are by definition adequately protected; inertia, because once such a bill is in place, it might seem that constitutional innovation ceases, unless circumstances are so extreme that the usually difficult process of constitutional amendment must be tried. To put it positively, with a judge-made constitution, a regressive legislatively or executive-driven revolution in constitutional morality is often easier to see, and progressive change toward a better realization of constitutional morality is easier to bring about. Indeed, such a constitution puts a greater burden on politics and on the people, but it is important to appreciate that the burden is one of maintaining both constitutionalism and legality.<sup>209</sup>

208 Dicey, *Law of the Constitution*, supra note 11 at 196.

209 We can recall in this regard two well-known examples of Learned Hand's eloquence, both of which are wrong, though instructively so. There is his claim in a dissenting judgment that 'Think what one may of a statute . . . when passed by a society which professed to put its faith in [freedom], a court has no warrant for refusing to enforce it. If that society chooses to flinch when its principles are put to the test, courts are not set up to give it derring-do.' *Shaughnessy v. Mezei*, 345 U.S. 206 (1953). And there is his thought that we should not 'rest our hopes too much upon constitutions, upon laws and upon courts,' because ultimately 'liberty lies in the

Second, with respect to legislative supremacy, I qualified that phenomenon with ‘so-called’ not because the idea of legislative supremacy is vacuous but because the common law conception of legislation is not well understood. Recall that Cockburn L.C.J. has been derided for suggesting, after the grand jury had failed to find a true bill, that the solution to the problem posed by the idea of martial law should be a legislative one.<sup>210</sup> As we have seen, that derision is premised on the assumption that the executive can then get all it wants through statute. But a closer inspection of Cockburn L.C.J.’s thought on this matter reveals something different:

If the legality of martial law be doubtful, still more if the exercise of it be illegal, and it be deemed desirable that there should be power to resort to it in great emergencies, let that power be recognised or established by Parliament. But in that case, let us hope that the exercise of martial law will be placed under due limitations, and its administration fenced round by the safeguards that were wisely provided by the legislature in the Act of 1833. Without these it may well be doubted whether martial law is not, under any circumstances, a greater evil than that which it is intended to prevent.<sup>211</sup>

The issue here goes back to the founding documents of the idea of the common law or judge-made constitution, at least to the tension between Blackstone’s claims on behalf of the virtues of the common law and his recognition of Parliament’s absolute authority. As David Lieberman points out, most commentators regard this tension as showing that Blackstone’s commitment to natural law was vacuous.<sup>212</sup> Indeed, Blackstone says that in times of necessity, when the safety of

hearts of men and women,’ and that when liberty there lies, one ‘needs no constitution, no law, no court to save it.’ Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* (London: Hamish Hamilton, 1954) at 189–90. Learned Hand was wrong because if judges do not give their society ‘derring-do,’ that society is not given the opportunity to decide whether to flinch or not. We need courts to alert men and women to the fact that government or the legislature or both are putting their liberty at risk, and in order for courts to fulfil that role, judges must have an understanding of constitutionalism that goes beyond the idea that judges are the guardians of rights only when they are working with an entrenched bill of rights. Absent an understanding of the presence and significance of the principles of legality in every legal order that deserves the title, judges will fail to perform their guardianship role, not only in common law legal orders but also in the best examples of legal orders with entrenched bills of rights.

210 Cockburn, *Charge of the Lord Chief Justice*, supra note 57 at 160.

211 Ibid. at 74–5. The reference is to an act passed to deal with disturbances in Ireland, which set up a system of courts martial to try offences and which provided for elaborate protections for those put on trial. See *ibid.* at 55–7.

212 David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989) at 48–55.

the whole society is at stake, ‘future generations’ might be forced to exercise ‘those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.’ And he suggests that such ‘*extraordinary* recourses to first principles’ could never be incorporated ‘in the *ordinary* course of the law.’ Ordinary law could supply no remedy to the ‘oppressions’ that might spring from such circumstances.<sup>213</sup> But, as Lieberman also points out, there is an interpretative mistake in ‘presuming that Blackstone’s attitude to parliamentary law-making was fully disclosed in his formal doctrines of constitutional sovereignty.’<sup>214</sup> As Lieberman goes on to show, Blackstone saw Parliament as a key contributor to constitutional development through its legislation, especially in the *Habeas Corpus* Act, by which it fixed ‘this *theoretical* development of our public law’ to the point where ‘the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative was happily established by *law*’<sup>215</sup> Blackstone’s sense that legislators have to be properly educated in their constitutional responsibilities so that they may take the lead in perfecting the implementation of constitutional morality thus chimes with a theme in contemporary scholarship of the need to restore the legislature’s role as a, perhaps the, primary interpreter of the constitution, a restoration that all who advocate it must and do recognize requires both reining in the executive and reinvigorating the office of the legislator.<sup>216</sup>

213 Ibid. at 52–3, quoting Blackstone, 1 *Commentaries on the Laws of England* at 250–1 [original emphasis].

214 Lieberman, *ibid.* at 55. For the importance of this issue in the imperial context see Hulsebosch, *Constituting Empire*, *supra* note 25, esp. at 39–41.

215 Lieberman, *ibid.* at 60–1, quoting Blackstone, 4 *Commentaries on the Laws of England* at 438–40, 439 n. [original emphasis].

216 *E.g.*, Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999); Roberto Unger, *What Should Legal Analysis Become?* (London: Verso, 1996); Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999). For an examination of some institutional implications see David Dyzenhaus, ‘Deference, Security and Human Rights’ in Benjamin J. Goold & Liora Lazarus, eds., *Security and Human Rights* (Oxford: Hart Publishing, 2007) 125. Witt sums up his view of the relationship between the contemporary situation in the United States and that described by Kostal in the nineteenth century as follows:

There is at least one critical difference between the constitutionalism of the twenty-first and nineteenth centuries: the culture of American foreign affairs constitutionalism is radically more polarized than the constitutionalism of the nineteenth century British Empire; it includes claims of unilateral executive authority, on the one hand, and judicially enforceable individual constitutional rights, on the other. Its British predecessor, by contrast, rejected both executive unilateralism and judicially enforceable constitutional rights in favor of a model that placed virtually all questions in the hands of Parliament. . . . What the [US Supreme] Court has done in the past several years is rein in the polarizing

Another way of putting this point is to say that all legal orders suffer from institutional immaturity, in that the resources are never fully in place to reach what we can think of as the ‘utopia of legality’ – the stage when all official acts are controlled by law.<sup>217</sup> One example of such immaturity is the lack of the centralized instruments of coercion that are a characteristic of the modern state, which at one time in England, and later in the colonies, meant that a militia had to be raised in times of civil strife. It was that institutional immaturity that was responsible for much of the confusion around the idea of martial law. But the lack of institutions to properly police what the executive claims under the head of prerogative powers is similarly a sign of immaturity, as is the lack of institutions to police powers delegated to the executive by statute, whether these be powers to deal with national security or whether they concern more mundane matters. Another example is the cumbersome process of private prosecution to which the Jamaica Committee resorted in its effort to bring Eyre and his officials to book. Similarly, I suggest that the reliance on the combination of suspension and act of indemnity is a sign of immaturity, in light of the development of an alternative model to suspension as immunity, one better capable of preserving constitutional morality – the derogation model. Legal orders with entrenched bills of rights may tend both to hide this problem and to make it more difficult to remedy it when it does come to light.

Out of these observations comes a more theoretical point, one inspired by the work of Lon Fuller, in particular his idea that legality is an aspirational ideal.<sup>218</sup> A standard legal positivist retort to natural law positions is to point to the existence of wicked laws and wicked legal systems. That retort seems to show that claims about necessary connections between law and morality are wishful thinking, so that we should instead resort to hard social facts about legal validity if we want to understand the nature of law, and also of legality. While much of John Austin’s work was discarded by legal positivists following H.L.A. Hart’s critique, the well-known paragraph that he considered a knock-down response to natural law was adopted by Hart and still characterizes the stance of

outliers and restore something approaching the Anglo-American constitutional-imperial debates of old.

Witt, ‘Anglo-American Empire,’ supra note 28 at 757. As I have shown in the text, Witt’s claim is right that the current legal situation resonates with that of the nineteenth-century British Empire, but he is wrong both in supposing that the culture of the nineteenth century was less polarized than that of the twenty-first and in thinking that Dicey’s model placed, in any simple manner, virtually all questions in the hands of Parliament.

217 See Lars Vinx, *Hans Kelsen’s Pure Theory of Law: Legality and Legitimacy*. (Oxford: Oxford University Press, 2007).

218 Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969).

legal positivists today. Austin advanced the example of a man who is convicted of a crime punishable by death, when the act in question was in fact trivial or even beneficial. The man objects that the sentence is 'contrary to the law of God,' but the 'inconclusiveness' of his reasoning, Austin says, is demonstrated by the 'court of justice' by 'hanging [him] up, in pursuance of the law of which [he had] impugned the validity.'<sup>219</sup> In much the same way, the failure of the prosecutions of Brand, Nelson, and Eyre can be taken as proof of the futility of the arguments of the Jamaica Committee and the lawyers who allied themselves with its cause.

It may be that this kind of retort works effectively against a Dworkinian position, one according to which a legal order, in order to be such, must contain the moral resources necessary for judges to invalidate a manifestly unjust law. However, it is less effective against a Fullerian natural law position according to which legal orders are always unfinished projects for the realization of the rule of law, works in progress that aspire to bring the legal order to the stage at which remedies do exist for all breaches of constitutional morality. Positivists will object that there is no difference between these positions, since the Fullerian one, no less than the Dworkinian one, faces the prospect of encountering the gap between aspiration and reality. But there is a difference, because the aspirational conception produces an ideal of fidelity to law that makes it incumbent on all officials of the legal order to act and decide in ways that live up to that ideal. That sometimes such work can be performed only by legislators, not by judges, cannot count against the aspirational conception; nor can the fact that judges or legislators or the executive or, for that matter, juries fail to live up to it, any more than the fact that individuals are prone to moral mistakes counts against an aspirational conception of morality.

If we go back to the quotation from Mill at the beginning of Part v, we are now in a better position to appreciate the idea behind his optimism, summarized in the thought that 'the character of our country' had been 'redeemed' since there had come into being a 'body of persons determined to use all means which the law afforded to obtain justice for the injured.' There are two explicit elements to that idea: first, that there has to be a body of people minded to struggle for justice, and capable of doing so; second, that the struggle for justice will be limited to the means that the law of the time happens to afford. But implicit is that statements of what legality – the presuppositions of the idea of legal justice – requires can be authoritative while outstripping what can be done according to the law of the time. One can find such statements outside of

219 H.L.A. Hart, 'Positivism and the Separation of Law and Morals' in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983) 49 at 73.

judgments – for example, in Cockburn L.C.J.’s charge, and in dissenting judgments, as in *Halliday* and *Liversidge*.

Indeed, the cycle of legality that terminated, at least for the time being, in SIAC could be said to be driven both by dissents and by the political will of those elites who were not prepared to let power be undisciplined by law. A jurisprudence of power is thus not a welding together of two disparate notions, *ius* (a system of legal right or legality) on the one hand and prudence (in some Machiavellian, power-calculating sense) on the other. Rather, it is the wisdom of legality, of the practice of governing by law, closely akin to Coke’s idea of the ‘artificial reason’ of the common law. I will now turn to examine some of the implications of this point for the topic of martial law and empire.

vi *Law’s empire*

Nobody answers this remarkable Lord Chief Justice, ‘Lordship, if you were to speak for six hundred years, instead of six hours, you would only prove the more to us that, unwritten if you will, but real and fundamental, anterior to all written laws and first making written laws *possible*, there must have been, and is, and will be coeval with Human Society, from its very first beginnings to its ultimate end, an actual *Martial Law*, of more validity than any other law whatsoever. Lordship, if there is no written law that three and three shall be six, do you wonder at the Statute Book for that omission? You may shut those elegant lips and go home to dinner. May your shadow never be less; greater it perhaps has little chance of being.’ (Thomas Carlyle)<sup>220</sup>

The precise issue we raise is this – that through our Empire the British rule shall be the rule of law; that every British citizen, white, brown, or black in skin, shall be subject to definite, and not to indefinite powers; that governors who govern by the sword must justify the necessity which compelled them to use it. Neither beyond the seas nor within them shall the executive place itself above law by simply declaring law abolished. Come what may, our colonial rule shall not be bolstered up by useful excesses or irresponsible force. Throughout our empire, as in this kingdom, government shall be responsible and defined; and there, as here, its basis shall be law, and not prerogative. (Frederic Harrison)<sup>221</sup>

220 Thomas Carlyle, ‘Shooting Niagara: And After?’ (1867) 16 *Macmillan’s Magazine* 319 at 324–5 [original emphasis] [Carlyle, ‘Shooting Niagara’].

221 Harrison, *Martial Law*, supra note 11 at 4. The idea for juxtaposing these starkly contrasting ideas (though not exactly these quotations) comes from Charles Townshend, ‘Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800–1940’ (1982) 25 *Historical Journal* 167 at 173.

Carlyle's caustic rebuke is aimed directly at Cockburn L.C.J., whom he regarded as part of the 'knot of rabid Nigger-Philanthropists, barking furiously in the gutter,' who would, if successful, place a 'rope around [the] ... neck' of any governor attempting to put down the 'frightfullest Mob-insurrection ... by way of encouragement to him.'<sup>222</sup> He also clearly saw that opposition to the Jamaica Committee was of a piece with opposition to parliamentary reform in England.<sup>223</sup>

Harrison, a barrister and member of the Jamaica Committee's executive body, constructed a detailed response to Finlason's treatise on martial law in six letters to the *Daily News*.<sup>224</sup> He too, as we can see, regarded the issue as not only about empire but about home: 'the contagion of lawlessness spreads fast. What is done in a colony to-day may be done in Ireland to-morrow, and in England hereafter.'<sup>225</sup> In his view, the issue raised by the Jamaica affair was a universal one, about the very point of legal order. 'If an Executive were left to decide who are the enemies of the State, and what necessity exists, political society would cease to be free.'<sup>226</sup> For him and for the others who rallied against Eyre, it mattered a great deal that the integrity of legal order be preserved, whether at home or abroad, and that the integrity be one of principle – most importantly, the principle of individual liberty.

However, as we have seen, contemporary commentators, including Kostal and Witt, find that the adoption of what Witt calls the legal frame for dealing with the vexed political issues of the day made little difference, perhaps no difference at all. Indeed, the legal frame may, Witt suggests, have obscured the real political questions.<sup>227</sup> That is, the frame could not encompass the questions that arose out of the troubled legacy of slavery, as settler whites and poor blacks contested scarce resources on highly unequal terms, the whites with their access to power, including legal and military power, the blacks with their resource of greater numbers.

Witt's diagnosis of the problem is that the legal materials – the authorities – on which the principal figures had to rely 'were too thin to produce a robust set of rules ... The law of empire, in other words, was not like the law of contracts or property or negotiable paper.' As a result, 'the legal frame functioned as little more than the mouthpiece of the contending sides for whatever ... they could plausibly argue and forcibly maintain.'<sup>228</sup> He also thinks that the same problem besets

222 Carlyle, 'Shooting Niagara,' supra note 220 at 324.

223 Ibid. at 323–4, 325.

224 See Kostal, *A Jurisprudence of Power*, supra note 27 at 150, 245–54.

225 Harrison, *Martial Law*, supra note 11 at 39.

226 Ibid. at 26.

227 Witt, 'Anglo-American Empire,' supra note 28 at 795–6.

228 Ibid. at 796.

contemporary debate in the United States, as the work of John Yoo, the United States' Finlason, shows.<sup>229</sup> Witt's rather gloomy analysis consciously tracks a constant theme of Kostal's book: 'law talk on all sides risks becoming little more than a thinly disguised repackaging of political or even partisan positions.'<sup>230</sup>

But the contention over the law of empire and the law of martial law comes about not because of the thinness of the legal materials compared to other legal topics but, rather, because of the fundamental nature of the questions posed by the very idea of martial law, if it is taken to be more than military law or common law necessity. This is Carlyle's point in the epigraph to Part VI. It is also the point that so concerned Robert Cover in much of his work: in the beginning was not the word but the deed, and a violent one at that. Law is founded on violence, and that fact hovers on the margins of all declarations, within a stable, well-functioning legal order, of what the law is.<sup>231</sup> The fact becomes brutally apparent only when legal order itself is perceived by the powerful to be under threat, or, as in the imperial context, when legal order has not yet been fully established. At such a moment law must sanction the reappearance of what always underpins it, and the narrative of legality recedes as the narrative of violence moves to centre stage.

However, even if it is the case that all legal and political orders are founded on some primeval act of violence,<sup>232</sup> one need not conclude that that primeval force lurks beneath the surface of legal order, always ready to assert itself in some moment of exception.<sup>233</sup> Rather, the point of having a state that has a monopoly on violence, and then of both centralizing the mechanisms of violence and subjecting their exercise to the rule of law, is to ensure that all acts of states, no matter how exigent the circumstances and no matter where they take place, treat the legal subject with dignity. One should never neglect law's capacity to move people in

229 John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005).

230 Witt, 'Anglo-American Empire,' supra note 28 at 796.

231 See the famous opening line of Robert Cover, 'Violence and the Word' in Martha Minow, Michael Ryan, & Austin Sarat, eds., *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1998) 203 at 203: 'Legal interpretation . . . takes place in a field of pain and death.'

232 See Thomas Hobbes's claim that there is 'scarce a Common-wealth in the world, whose beginnings can in conscience be justified': *Leviathan* (1651), ed. Richard Tuck (Cambridge: Cambridge University Press, 1997) at 486. For a discussion of this thought, one in clear tension with Hobbes's claim that all sovereigns are legitimate, see David Dyzenhaus, 'Hobbes' Constitutional Theory' in Ian Shapiro, ed., *Leviathan* (New Haven, CT: Yale University Press, forthcoming).

233 See David Dyzenhaus, 'The Politics of the Question of Constituent Power' in Martin Loughlin & Neil Walker, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007) 129.



and out of categories within borders – ‘law’s role in producing the alien within’<sup>234</sup> – and, as the events that followed 9/11 have shown, such attempts can be made within the borders of the nation-state and in respect of citizens, though they are more likely to be successful when they are made in respect of non-citizens beyond those borders. Thus it is important to ensure that the person acted upon is characterized as the legal subject, not as the citizen. It is also important to stress that what matters is the fact of the exercise of state power, not where it takes place.

The story of empire, whether in the nineteenth century, the twentieth, or the twenty-first, starkly illuminates these ideas. It is for this reason that legal scholarship has recently taken what the distinguished historian Lauren Benton calls, in a review of books on constitutionalism and empire, the ‘imperial turn.’<sup>235</sup> As sovereign states spread their rule beyond their borders, they create both ‘anomalous legal zones’ – for example, Guantanamo Bay<sup>236</sup> – and ‘anomalous legal actors,’<sup>237</sup> categories which, as I understand them, come about because the zones and the actors seem both constituted by law and yet somehow immune to law’s constitution of principle. The distinctions between black and white and between colonizer and colonized are replaced by the distinction between citizen and non-citizen, though the last distinction may often operate as a surrogate for the first two.<sup>238</sup>

Benton predicts that the imperial turn will succeed the ‘linguistic turn’ in legal and other scholarship, that is, the turn to analysing law and other phenomena in terms of narratives of socially constructed meanings.<sup>239</sup> My sense is that that the imperial turn in legal scholarship will not so much follow the linguistic turn as better situate our understanding of the latter.

234 Audrey Macklin, ‘Borderline Security’ in Ronald J. Daniels, Patrick Macklem, & Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001) 383 at 398.

235 Lauren Benton, ‘Constitutions and Empires,’ Book Review of *The Transatlantic Constitution: Colonial Legal Culture and the Empire* by Mary Sarah Bilder, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830*, by Daniel J. Hulsebosch, and *The Constitution of Empire: Territorial Expansion and American Legal History* by Gary Lawson & Guy Seidman (2006) *Law & Soc. Inquiry* 177.

236 *Ibid.* at 178, citing Gerald L. Neuman’s prescient ‘Anomalous Zones’ (1996) 48 *Stan.L.Rev.* 1197.

237 *Ibid.* at 179–80.

238 For a sensitive analysis of such issues, with specific reference to the Jamaica affair and Carlyle’s role in it, see Simon Gikandi, *Maps of Englishness: Writing Identity in the Culture of Colonialism* (New York: Columbia University Press, 1996) at c. 2, ‘Through the Prism of Race: Black Subjects and English Identities.’ Compare Duncan Bell, *The Idea of Greater Britain: Empire and the Future of World Order, 1860–1900* (Princeton, NJ: Princeton University Press, 2007). Both Gikandi and Bell stress the importance of understanding the need of the English to deal with crises of various sorts by defining themselves against the ‘other.’

239 Benton, ‘Constitutions and Empires,’ *supra* note 235 at 177.

It will help us to understand the relationship between Cover's trio of narrative, violence, and the law.

Indeed, Cover thought that law inevitably makes an 'imperial turn,' since it has two modes of operation, the 'imperial' and the 'paideic.'<sup>240</sup> The latter is the normative field common to a community that does not require force or institutions for its maintenance, only strong commitment, while the latter is the mode into which a paideic community moves when its reach extends over other communities. Since these other communities lack the stance of strong internal commitment, the norms must be presented as universal, objective, to be enforced by institutions. This interplay between the paideic and the imperial modes of law is the story of martial law, even of empire itself.<sup>241</sup>

As I have indicated, one way of conceiving empire was as a raw projection of power, in the sense of power unmediated by law. But however the advocates of empire conceived what it was to govern through law, they saw no option but so to govern, in part, as I have mentioned, because governing through law legitimized empire. As we have seen, even those, like Finlason or Eyre, who thought it appropriate to resort to raw power in times of stress wanted to claim that their resort was legally authorized. Indeed, they were tempted at times to go beyond this claim and say that law exercised some control over their exercise of that power.

Instructive here is that both James and Mill thought it important to have law be the medium of imperial government – not the messy common law but a system of top-down rational control, an idea inspired by Jeremy Bentham and given its most systematic elaboration by John Austin.<sup>242</sup> The focus of these utilitarian legal positivists was on law as a system of commands, a 'one-way projection of authority,' as Fuller was to term it.<sup>243</sup> They were not therefore interested in the idea of legality in itself, except insofar as it was necessary to make the system into such a *system of commands*.<sup>244</sup>

240 Cover, 'Nomos and Narrative,' supra note 1 at 105–6. Ernie Weinrib informs me that the word comes from the Greek verb *paideuo* ('to teach') and especially the noun form *paideia* ('education').

241 The interplay is wonderfully described in Hulsebosch, *Constituting Empire*, supra note 25.

242 See Eric Stokes, 'Law and Government' in Eric Stokes, *The English Utilitarians and India* (1959; reprint, Oxford: Oxford University Press, 1989) 140; R.B. Friedman, 'An Introduction to Mill's Theory of Authority' in J.B. Schneewind, ed., *Mill: A Collection of Critical Essays* (London: Macmillan, 1968) 379.

243 Fuller, *The Morality of Law*, supra note 218 at 207.

244 See the perceptive discussion of these legal theoretical issues in Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2006) at c. 2 ('The Colonial Concept of Law') and at 120–2.

While Hart's early work, in particular his 1958 *Harvard Law Review* essay 'Positivism and the Separation of Law and Morals,' written as Britain had accelerated the process of dismantling its empire, sought to fix the attention of legal theory on the normative question of the legality of law, he and his followers have never successfully made the transition from a legal theory designed in part for imperial top-down control. Moreover, that kind of control was resisted by colonized subjects, who argued that if they were to be governed by law, they deserved also the rule of law, that is, the legal protections afforded to subjects by the common law of England.<sup>245</sup> Recall that the Jamaicans who rose up in Morant Bay began their uprising in large part because of their dissatisfaction with the justice system.

Of course, utilitarian legal positivism was motivated only in part by imperial concerns. While some utilitarians thought that the colonies presented an opportunity to experiment with law reforms that could then be brought home to tidy up the mess of the common law,<sup>246</sup> the primary impulse of their legal theory was law reform at home. They thus demonstrated a commitment to integrity of the sort we saw Kostal identify: government according to law cannot mean one thing at home and another in the colonies. While there is no evidence that John Stuart Mill revised his commitment to this kind of theory, that he became one of the leading lights of the Jamaica Committee because of his fears about the implications of the Jamaica affair for politics at home is telling.<sup>247</sup> It shows that he saw that the insular legal community of England – a paideic community, to use Cover's term – was threatened

245 See Hulsebosch, *Constituting Empire*, supra note 25, for a sustained exploration of this theme in the context of New York.

246 See Eric Stokes, *The English Utilitarians and India* (Oxford: Oxford University Press, 1989) at c. 3. However, not all utilitarians were enthusiastic imperialists; see Duncan S. Bell, 'Empire and International Relations in Victorian Political Thought' (2006) 49 *Historical Journal* 281 at 285–7 (noting at 287 that Bentham was a critic of empire), and Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton, NJ: Princeton University Press, 2005) at c. 4. See further F. Rosen, 'Eric Stokes, British Utilitarianism, and India' in Martin I. Moir, Douglas M. Peers, & Lynn Zastoupil, eds., *J.S. Mill's Encounter with India* (Toronto: University of Toronto Press, 1999) 18 at 28. Rosen also argues that Bentham's utilitarianism was not authoritarian, since Bentham opposed open grants of discretion to public officials (at 24) and, in general, wanted powerful groups to be subject to the rule of law (at 22). However, the question for Bentham, as for Mill, on this issue is whether a repudiation of the common law constitution does not lead to authoritarianism.

247 Mill regarded his speech to Parliament on the Jamaica affair as the best of his political career. Mill, *Autobiography*, supra note 130 at 218. But while it is a fine example of political rhetoric about the need for executive accountability to law, it is rather wanting when it comes to the role that law would play. Indeed, Mill accepts in the speech the view that martial law suspends law; see U.K., H.C., *Parliamentary Debates*, 3d ser., vol. 184, col. 1797 at 1802–3 (31 July 1866).

by the way in which legal power was projected into the empire. The issue of legal integrity is thus not simply about consistency between what one does at home and what one does outside; it is also about what one does at home. For there to be integrity, in other words, integrity must be with principles; hence the deliberate evocation of Ronald Dworkin's major work in philosophy of law for the title of Part VI.

It is, in my view, significant that Witt, while seeming to endorse Kostal's thought that the legal frame is no more than a contest of warring narratives, still hankers after an aspirational conception of law in which law does provide a genuine constraint on power, even imperial power.<sup>248</sup> For example, he says,

Law talk may produce and reproduce community. But the consequences of law talk are more extensive still. Legal discourse produces a particular form of community. The choice to engage in law talk is the choice to engage in a kind of discourse with its own internal morality – a morality that rests on reasons and that entails the dignity of the individuals who make claims on it.<sup>249</sup>

This self-consciously Fullerian statement, though made without reference to Fuller, suggests that Witt's idea of the legal frame adds a further element to Cover's trio of narrative, violence, and the law. The legal frame, that is, has its own discipline, one that excludes certain narratives, including and especially one in which the centralized coercive apparatus of the state, its monopoly on violence, is uncontrolled by law. Moreover, not only does the legal frame contain substantive principles of constitutional morality, but our sense of what those principles are and of how best to live up to them evolves. The legal frame thickens over time.

That decisions taken by legal and political actors can undermine those principles does not demonstrate that there is plurality of constitutional narratives. As Harrison said, the 'vaunted doctrines of the English Constitution are either real or sham.'<sup>250</sup> One could choose 'the cause of personal liberty, the inviolability of law, just procedure, official responsibility, equal justice, and ancient precedent.' Or one could choose 'arbitrary rule, military jurisdiction, wild injustice, martial licence, race prejudice, and strange prerogative.'<sup>251</sup>

Here one has to take into account that the compulsion of legality can set in motion two very different cycles of legality. In one virtuous cycle, the institutions of legal order cooperate in devising controls on public actors that ensure that their decisions comply with the principle of

248 Witt, 'Anglo-American Empire,' supra note 28 at 796–7, referring to Kostal, *A Jurisprudence of Power*, supra note 27 at 487.

249 Witt, *ibid.* at 784.

250 Harrison, *Martial Law*, supra note 11 at 39.

251 *Ibid.* at 42.

legality, understood as a substantive conception of the rule of law. In the other cycle, the content of legality is understood in an ever more formal or empty manner, resulting in the mere appearance, or even the pretence, of legality. In this second cycle, the compulsion of legality results in the subversion of constitutionalism – the project of achieving government in accordance with the rule of law. Arbitrariness is covered over by what an English judge referred to recently as a ‘thin veneer of legality.’<sup>252</sup>

On the argument of this article, those who participate in this second cycle risk participating in and legitimizing a sham.<sup>253</sup> That it is a sham demonstrates that it is possible to govern outside the legal frame while pretending, or even believing, that one is inside it. There are, then, to revert to the epigraph to this article, some assertions of jurisdiction by judges and also by other legal actors, most notably legislatures, that are jurisgenerative while not being jurispthic. They make possible the legal frame itself.

However, even those who participate in a sham rather than a virtuous cycle of legality maintain law’s potential to discipline political power, since they at least pay lip service to the legal frame as providing the discursive boundaries for the adjudication of issues such as the appropriate government response to threats to national security. As we have seen, while the Finlasons of the legal world think that the role law plays in situations such as the Jamaica affair is to create an absence of law under the concept of necessity, they still do not suppose that the space of martial law is a total black hole. Rather, they conceive of that space as one created, perhaps even in some sense bounded, by law. And, as I have tried to show, in participating even in this way in maintaining the legal frame, they make it possible for other participants to set in motion the virtuous cycle of legality.

252 *MB v. Secretary of State for the Home Department*, [2006] EWHC 1000 (Admin) at para. 103.

253 I would include in the list Cass Sunstein, ‘Minimalism at War’ [2004] Sup.Ct.Rev. 47, and Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006). Sunstein is content with vague legislative authorizations, and both he and Posner seem to argue for outright deference to the executive. I would also include Eric A Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York: Oxford University Press, 2007), who are willing to drop even the requirement of vague legislative authorization on the wholly unsupported basis that cost–benefit analysis shows that the executive generally makes better decisions than judges when it comes to emergencies. Posner and Vermeule argue that because what law requires coincides with the conclusions of cost–benefit analysis, the rule of law authorizes the executive to do as it will.

*Appendix*

*An act for indemnifying such persons as, since the first day of February one thousand seven hundred and ninety-three, have acted in the apprehending, imprisoning, or detaining in custody, in Great Britain, of persons suspected of high treason on treasonable practices. [June 24, 1801.]*

WHEREAS by an act, passed in the parliament of Great Britain in the thirty-fourth year of his present Majesty's reign, intituled, An act to empower his Majesty to secure and detain such persons as his Majesty shall suspect are conspiring against his person and government, reciting, that a traitorous and detestable conspiracy had been formed for subverting the existing laws and constitution, and for introducing the system of anarchy and confusion which had so fatally prevailed in France, it was for the better preservation of his Majesty's sacred person, and for securing the peace and the laws and liberties of the kingdom, enacted, That every person or persons who were or should be in prison, within the kingdom of Great Britain, at the time therein mentioned, or after, by warrant signed as therein specified, for high treason, suspicion of high treason, or treasonable practices, might be detained in safe custody as thereby provided; and that the act made in Scotland, intituled, An act for preventing wrongous imprisonment and against undue delays in trials, in so far as the same might be construed to relate to cases of treason and suspicion of treason, should be suspended, as therein also provided; which act was to continue in force until the first day of February one thousand seven hundred and ninety-five, and was afterwards by a subsequent act continued until the first day of July one thousand seven hundred and ninety-five: and whereas by another act, passed in the parliament of Great Britain, in the thirty-eighth year of the reign of his present Majesty, also intituled, An act to empower his Majesty to secure and detain such persons as his Majesty shall suspect are conspiring against his person and government, reciting, that his Majesty's enemies were making preparations, with considerable and increasing activity, for the invasion of his Majesty's dominions, and that these designs were encouraged by the traitorous practices of wicked and disaffected persons within the realm, it was, for the like purposes, enacted in like manner as is contained in the said recited act of the thirty-fourth year of his Majesty's reign; which act of the thirty-eighth year of his Majesty's reign was to continue in force until the first day of February one thousand seven hundred and ninety-nine, and was afterwards, by several subsequent acts, continued until six weeks after the commencement of the present session of parliament: and whereas, by an act passed in this present session of parliament, intituled, An act for reviving and further continuing, until six weeks after the commencement of the next session of parliament, several acts made in the thirty-eighth, thirty-ninth, and fortieth years of his present Majesty's reign, and in the last session of parliament, for empowering his Majesty to secure and detain such persons as his Majesty shall suspect are conspiring against his person and government, it was enacted in like manner as is contained in the said act passed in the thirty-eighth year of his present Majesty's reign; and which said act of the present session of parliament is to continue in force until the expiration of six weeks after the commencement of the next session of parliament: and whereas in order to secure the internal peace and tranquility of the country, and to counteract the traitorous designs in the said acts recited, it hath been deemed necessary from time to time to apprehend, imprison, and detain in custody, in Great Britain, divers persons suspected of high treason or

*treasonable practices: and whereas in case the acts and proceedings of the several persons employed or concerned in such apprehending, imprisoning, and detaining in custody, should be called in question, it would be impossible for them to justify or defend the same without an open disclosure of the means by which the said traitorous designs were discovered; and it is necessary, for the further prevention of similar practices, that those means of information should remain secret and undisclosed;* be it therefore enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all personal actions, suits, indictments, informations, and prosecutions, heretofore brought, commenced, preferred, exhibited, or now depending, or to be hereafter brought, commenced, preferred, or exhibited, and all judgements thereupon obtained, if any such there be, and all proceedings whatsoever, against any person or persons, for or on any account of any act, matter, or thing by him or them done, or commanded, ordered, directed, or advised to be done, in *Great Britain*, since the first day of *February* one thousand seven hundred and ninety-three, for apprehending, imprisoning, or detaining in custody any person charged with or suspected of high treason or treasonable practices, shall be discharged and made void, and that every person by whom any such act, matter, or thing shall have been done or commanded, ordered, directed, or advised to be done, shall be freed, acquitted, discharged, and indemnified as well against the King's majesty, his heirs and successors, as against the person and persons so apprehended, imprisoned, or detained in custody, and all and every other person and persons whomsoever.

II. And be it further enacted, That if any action or suit hath been or shall be brought, commenced, or had, in any court within *England* or *Wales*, against any person or persons, for or on account of any such act, matter, or thing as aforesaid, he and they may plead the general issue, and give this act and the special matter in evidence; and if the plaintiff or plaintiffs shall become nonsuit, or forbear further prosecution, or suffer a discontinuance in any such action or suit, or if a verdict shall pass against the plaintiff or plaintiffs therein, the defendant or defendants shall have and be entitled to double costs, for which he or they shall have the like remedy as in other cases in which costs by law are given to defendants; and if any such action or suit hath been or shall be brought, commenced, or had, in any court within that part of *Great Britain* called *Scotland*, the court before whom or in which such action or suit shall be brought, commenced, or had, or shall be depending, shall allow to the defender or defenders therein, the benefit of the discharge and indemnity herein-before provided, and shall further decern the pursuer or pursuers to pay the defender or defenders the full and real expences which he or they shall be put to by such action or suit.

III. And be it further enacted, That if any action, suit, indictment, information, prosecution, or proceeding, hath been or shall be brought, commenced, preferred, exhibited, or had, in any court in *Great Britain*, against any person or persons, for or on account of any such act, matter, or thing as aforesaid, it shall be lawful for the defendant or defendants, defender or defenders, in any such action, suit, indictment, information, prosecution, or proceeding, or for any of them, to apply by motion, petition,

or otherwise, in a summary way, to the court in which the same hath been or shall be brought, commenced, preferred, exhibited, or had, or shall be depending, if such court shall be fitting, and if not fitting, then to any one of the judges or justices of such court, to stay all further proceedings in such action, suit, indictment, information, prosecution, or proceeding; and such court, and any judge or justice thereof when the said court shall not be sitting, is hereby authorised and required to examine the matter of such application, and upon proof by the oath or affidavit of the person or persons making such application, or any of them, or other proof to the satisfaction of such court, judge, or justice, that such action, suit, indictment, information, prosecution, or proceeding is brought, commenced, preferred, exhibited, or had, for or on account of any such act, matter, or thing as aforesaid, to make an order for staying execution and all other proceedings in such action, suit, indictment, information, prosecution, or proceeding, in whatever state the same shall or may then be, and although judgement shall have been entered up of record, or given, or any writ of error or appeal shall have been brought or made, or shall be depending therein; and the court, or the judge or justice making such order for stay of proceedings in any action or suit as aforesaid, shall also order unto the defendant or defendants, defender or defenders, and he and they shall have and be entitled to double costs, for all such proceedings as shall be had or carried on in any such action or suit, after the passing of this act; and for which costs he and they shall have the like remedy as in cases where costs are by law given to defendants or defenders: provided always, That it shall be lawful for any person or persons, being a party or parties to any such action, suit, indictment, information, prosecution, or other proceeding, to apply by motion, petition, or otherwise, in a summary way, to the court in which the same shall have been brought, commenced, preferred, exhibited, or had, or shall be depending, to vacate, discharge, or set aside any order made by any judge or justice if that court for staying proceedings, or for the payment of costs as aforesaid, so as such application be made within the first four days on which such court shall sit next after the making of any such order by any judge or justice as aforesaid; and such court is hereby required to examine the matter of such application, and to make such order therein as if the application had been originally made to the said court; but nevertheless, in the mean time and until such application shall be made to the said court, and unless the said court shall think fit to vacate, discharge, set aside, or reverse the order made by any such judge or justice as aforesaid, the same shall continue in full force to all intents and purposes whatsoever.